



# Participation TV: Regulatory Statement

Rules on the promotion of premium rate services

Statement

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## Section 1

# Executive Summary

## Introduction

- 1.1 Ofcom published a third consultation on *Participation TV: rules on the promotion of premium rate services*<sup>1</sup> on 3 November 2009. This document is Ofcom's regulatory statement on this consultation.
- 1.2 The consultation confirmed (following previous consultations) Ofcom's decision to amend the Broadcasting Code to clarify that services designed primarily to promote Premium Rate Service (PRS) lines would not be considered as editorial in nature (and regulated under the Broadcasting Code) but would be treated as advertising. Advertising is regulated under the BCAP Broadcast Advertising Standards Code (the Advertising Code). The consultation set out the new rules and associated guidance under the Broadcasting Code.
- 1.3 The changes were necessary to ensure that, as required by the relevant European legislation, advertising is readily recognisable and distinguishable from editorial content. We consider that the changes to the Broadcasting Code benefit viewers and consumers, by maintaining the distinction between editorial and advertising and offering enhanced consumer protection for the latter under the Advertising Code, and benefits broadcasters by increased clarity, consistency and therefore fair competition in the acceptable use and promotion of PRS.
- 1.4 In reaching its conclusions, Ofcom recognised that, when the new Broadcasting Code rules are brought into effect, those Participation TV (PTV) services which were previously regulated under the Broadcasting Code may now fall to be regulated under the Advertising Code.
- 1.5 Our impact assessment suggested that relatively few services will be significantly affected by this change and need to modify their services. However, two categories of service – Adult Chat<sup>2</sup> PTV and Psychic PTV - could not continue to operate as they do currently if classified as advertising since the promotion of some categories of premium rate services (PRS) featured on these services is heavily restricted under the Advertising Code. In particular, under the current Advertising Code rules, services predicated on the promotion of live psychic PRS (Psychic PTV) or PRS of a sexual nature (Adult Chat PTV) on a free to air basis would not be permitted.
- 1.6 However, research commissioned by Ofcom on audience views of Participation TV services showed that viewers are generally tolerant of such services continuing to be broadcast, subject to certain safeguards to ensure that services are appropriately labelled and positioned so that viewers do not chance upon them unintentionally. Ofcom therefore considered changes to the Advertising Code to ensure that the

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<sup>1</sup> See <http://www.ofcom.org.uk/consult/condocs/participationtv3/>

<sup>2</sup> 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.

regulation of those services remains proportionate to the aim of protecting the viewing public from harm and/or offence.

- 1.7 The consultation set out four options for the future regulation of Adult Chat PTV services. These options were:
1. Retain the current rules, allowing promotion of PRS of a sexual nature on encrypted channels only<sup>3</sup>;
  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.
- 1.8 The consultation also set out four options for the future regulation of Psychic PTV services. These options were:
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;
  4. Allow promotion of these specific live personal psychic services only in dedicated teleshopping channels, subject to labelling rules.
- 1.9 We stated that, in each case, Option 4 was Ofcom's preferred option for regulation of promotion of these services. We proposed amendments to the relevant rules in the Advertising Code, to be introduced when the changes to the Broadcasting Code come into effect.
- 1.10 We invited responses to the consultation, and particularly to Ofcom's proposal to amend the Advertising Code rules concerning the promotion of telecommunications based sexual entertainment services or featuring live psychic services. The responses are summarised in Section 2 of this document.

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<sup>3</sup> In the consultation and this document when referring to "encrypted" channels or "encrypted" elements on those channels, Ofcom means the same as "mandatory restricted access" as defined in Rule 1.18 of the Ofcom Broadcasting Code (revised December 2009). Both the existing and new draft BCAP Codes refer for example to "encrypted elements of adult entertainment channels."

## Amendments to the Advertising Code rules

- 1.11 Following consideration of the responses, Ofcom intends to implement the changes to the Advertising Code rules. However, this will be with amendments to the Advertising Code rules as proposed in two areas.
- 1.12 The proposed Advertising Code rules for promotion of telecommunications based sexual entertainment services required channels to be appropriately positioned and labelled within an 'Adult' or similar section of an Electronic Programme Guide (EPG) on any platform. Digital Satellite (Sky, Freesat) and Digital Cable (Virgin Media) platforms operate segregated genre-based EPGs including an 'Adult' section: channels on these platforms would be able to meet the conditions the proposed rule. However, due to the lack of a segregated EPG on most set-top boxes, channels would currently be unable to meet the conditions for promotion (unless in encrypted form) on the Digital Terrestrial Television (DTT) platform. The most commonly used operator on the DTT platform is Freeview, which provides free-to-air services; there are other operators who provide these free-to-air services plus additional subscription services via DTT. The DTT EPG is administered by the Digital TV Multiplex Operators consortium (DMOL).
- 1.13 A proposal from Arqiva, who operate DTT multiplexes that carry Adult Chat PTV services and are a board member of DMOL, seeks to improve labelling and sign-posting on the DTT EPG. Ofcom considers that, if such a proposal were implemented, channels carried on DTT would be able to meet the proposed Advertising Code requirement that such channels "are appropriately positioned and labelled within an 'Adult' or similar section of an Electronic Programme Guide".
- 1.14 However, Ofcom notes that, compared to other TV platforms, DTT provides a smaller number of channels to access; also, not all receivers offer parental controls, to block either individual channels or groups of channels on the platform. The risk of unintentional viewing is therefore higher than with other platforms, and we consider that a stricter timing restriction should be introduced for DTT: that adult sex chat services should be allowed only between midnight and 0530 hours, rather than 2100-0530 on other platforms.
- 1.15 Under the revised Advertising Code rules set out in the consultation document, in order to promote live psychic PRS, Psychic PTV channels would need to be "appropriately positioned and labelled within a 'Specialist' or similar section of an EPG" on any platform.
- 1.16 We recognised that the rules as drafted would mean that only channels within an appropriate EPG section would be able to do so, and that this would prevent 'simulcasting' (where the content of one channel is broadcast at the same time on another channel) or teleshopping 'windows' of such content featuring on general entertainment channels. A number of responses claimed that this restriction was disproportionate and would make the core Psychic TV services unviable.
- 1.17 In the light of these submissions, Ofcom has considered whether the restriction of Psychic PTV services to the 'Specialist' area of an EPG is proportionate to its policy aims. We have considered new information on the financial model of Psychic TV broadcasters, and noted the lack of evidence of risks of harm to users from the psychic services that would be permitted under the rules. We have also considered the risk of offence to viewers.

- 1.18 Taking these factors into account, we will amend the proposed rule to remove the requirement to be positioned in a 'Specialist' section of the EPG. However, we consider that the conditions of the rule that broadcasters wishing to promote psychic practices, either on entire channels, or simulcast or in teleshopping windows, should ensure that such content is labelled as such i.e. as featuring psychic practices. This will allow viewers to make an informed viewing choice, and for channels wishing to promote psychic PRS to be clearly identified. Ofcom will also keep under review the products featured and the way in which they are advertised.
- 1.19 The revised rules, which reflect the amendments above, are set out in Section 3 of this document.

## Next steps

- 1.20 The revised Advertising Code is due to come into effect on 1 September 2010. The amended rules will be effective from this date.
- 1.21 The changes to the Broadcasting Code which were confirmed in the consultation will also come into effect on this date.
- 1.22 No action will be required for most PTV channels as a result of the changes to the Broadcasting Code and Advertising Code. However, they must ensure that from 1 September 2010 they comply with the Advertising Code.
- 1.23 The revised Advertising Code rules will require TV channels wishing to promote telecommunications based services sexual entertainment services or live psychic PRS to ensure that they are licensed for the purpose of the promotion of such services. These licences are currently categorised as 'editorial' in the annex to the licence, and will need to be amended to be 'teleshopping' licences. Broadcasters would therefore need to request an amendment to the annex to their licence to reflect these requirements should they wish to broadcast such content. This should be in advance of the date that the rules come into effect on 1 September 2010.
- 1.24 Ofcom, BCAP and the Advertising Standards Authority (ASA) have agreed that, for the time being, Ofcom will be the regulatory body for Participation TV (defined as all types of long-form advertising that are primarily dependent on promotion of Premium Rate Service phone lines, and other paid interaction with content). This includes services currently regulated by Ofcom (adult chat, psychic, quiz) and others currently regulated by the ASA (gambling, message boards, dating).

## Section 2

# Stakeholder comments and Ofcom responses

## Introduction

- 2.1 Ofcom published a third consultation on *Participation TV: rules on the promotion of premium rate services*<sup>4</sup> on 3 November 2009. The consultation confirmed (following previous consultations) Ofcom's decision to amend the Broadcasting Code to clarify that services designed primarily to promote Premium Rate Service (PRS) lines would be treated as advertising (and regulated under the Advertising Code).
- 2.2 Ofcom recognised that, when the new Broadcasting Code rules are brought into effect, those Participation TV (PTV) services which were previously regulated under the Broadcasting Code may now fall to be regulated under the Advertising Code. In particular, under the current Advertising Code rules, services predicated on the promotion of live psychic PRS (Psychic PTV) or telecommunications based sexual entertainment services (Adult Chat PTV) on a free to air basis would not be permitted.
- 2.3 Ofcom set out options for regulation of promotion of these services. In each case Ofcom set out its preferred option and proposed amendments to the relevant rules in the Advertising Code.
- 2.4 In the consultation, Ofcom invited stakeholders' comments on:
- our assessment of which stakeholders are likely to be affected by changes to the regulatory framework for Adult Chat and Psychic PTV services;
  - our understanding of the industry and operators;
  - our analysis of the options available for regulation;
  - our suggestion that a change to the rules appears merited;
  - our preferred option 4 – a change to the Advertising Code to allow promotion of PRS of a sexual nature and psychic PRS in teleshopping, subject to certain timing and labelling rules - meets the regulatory duties and suggests least potential impact on stakeholders;
  - our identified principles for changes to the Advertising Code rules, and the wording of the proposed rules.
- 2.5 Ofcom received 31 responses in total (27 from companies and organisations, and 4 from individuals). Responses are available on Ofcom's website<sup>5</sup>, with identities of the respondents concealed in three cases where this was requested.

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<sup>4</sup> See <http://www.ofcom.org.uk/consult/condocs/participationtv3/>

<sup>5</sup> <http://www.ofcom.org.uk/consult/condocs/participationtv3/responses1/>



2.6 The key themes to stakeholders' responses are listed below and then examined in turn:

- Restriction of Adult Sexual Chat services on DTT (para 2.7)
- Simulcasting of Psychic PTV services (2.36)
- Relaxing the current terms of the TV Advertising Code (2.68)
- Separation of advertising from editorial content (2.79)
- Payment mechanisms (2.81)
- Requiring EPG providers to regulate PTV (2.91)
- Encryption of Adult Chat PTV services (2.99)
- Self- or co-regulation (2.109)
- Retain restrictions on Adult Chat PTV (2.111)
- Research (2.117)
- Impact assessment (2.125)
- Other issues (2.132).

## **Restriction of Adult Sexual Chat on Digital Terrestrial Television**

### **Summary of comments**

- 2.7 Under the revised Advertising Code rules set out in the consultation document, Adult Sexual Chat PTV channels must be “appropriately positioned and labelled within an ‘Adult’ or similar section of an EPG” on any platform. Due to the lack of a segregated EPG on most set-top boxes, channels on the Digital Terrestrial Television (DTT) platform would currently be unable to meet the conditions for promotion (unless encrypted).
- 2.8 Several stakeholders felt that this rule discriminated against the DTT platform and PTV operators who use it, or might do so. Companies including Com and Tel and Questico, and organisations representing member companies – including the Association for Interactive Media and Entertainment (AIME) and the Participation Television Broadcasters Association (PTVBA) – that operate PTV or PRS services, argued that such discrimination is anti-competitive and unfair. Arqiva Digital Platforms, which is licensed to operate two digital terrestrial television multiplexes and is a founder member of Freeview, argued that the proposed rules would “have a detrimental impact on commercial DTT multiplex licence operators, diminish inter-platform competition and reduce the extent to which DTT multiplex licence operators are able to comply with the requirement to serve diverse tastes and interests”.
- 2.9 Sky, which provides a competing digital television platform, also considered the rule to be discriminatory against Freeview. The PTVBA suggested that the rule would be

unlawful, since the Audiovisual Media Services Directive (AVMS) guarantees carriage on any free-to-air platform. MX Telecom, a provider of PRS facilities to PTV suppliers, argued that “technological neutrality is being undermined [without] a compelling justification overriding the need to adhere to this principle”.

- 2.10 Com and Tel, PTVBA and an individual respondent all said that, in the absence of widespread consumer harm or complaints, no restriction of Adult Chat and Psychic PTV on Freeview was necessary.
- 2.11 A number of stakeholders, including AIME, PTVBA, several PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) and two individual respondents said that the rule would deny freedom of choice to Freeview customers. One individual commented that “many viewers who might wish to access these channels are unable to use any digital platform other than Freeview”. Questico said the rule would “force customers to pay a premium to access information”.
- 2.12 Arqiva, who operate DTT multiplexes that carry Adult Chat PTV services and are a board member of DMOL, considered that Freeview already has protections in place to prevent customers accidentally accessing potentially harmful or offensive material: all Adult services, including Adult Chat services have been grouped together towards the end of the EPG, and none of the current Adult Sex Chat services commences before midnight. Five, which sublets some of its digital channel capacity late at night to an Adult Chat PTV channel (Partyland), argued that the rule “draws a very thin line between the Sky platform and Freeview... Both platforms have a separate area for such dedicated programming. In both cases viewers need to take a conscious decision to seek out such channels, and will not come across them unintentionally when scrolling through general entertainment or other wider interest channels.” The Premium Rate Association (PRA), which represents PRS providers, PTVBA and MX Telecom also felt that consumer protection was already in place on Freeview. AIME examined 50 Freeview set top boxes and TVs, and found that only five of them did not contain parental control features. An individual respondent said that Freeview customers could easily remove channels that they found offensive, or restrict the channels with a PIN.
- 2.13 Stakeholders suggested further measures which could be taken to protect Freeview customers from accidentally finding content which they might consider harmful or offensive. Arqiva, Five, and an individual respondent suggested prefacing Adult Chat PTV channel names with the word ‘Adult’. Arqiva also suggested ‘book-end slates’ at the start and end of the Adult genre in the Freeview channel listing
- 2.14 Five said it would not object if Ofcom were to apply differential scheduling rules to Freeview, so that while Adult Chat PTV services could broadcast after 9pm on some platforms, they would be restricted until 11pm or midnight on Freeview.
- 2.15 The PRA felt that “the real and ultimate responsibility for programme restriction must be the parent or guardian located in the home”, since “reclassification will not stop minors viewing content which may not be suitable for them”.
- 2.16 AIME and Arqiva requested that, before any new rules are implemented, the Freeview platform and relevant channels should be given time to implement agreed changes.

- 2.17 Five claimed “it is somewhat disingenuous for Ofcom to argue that the Freeview platform might evolve to develop segregated EPGs, as Freeview is a horizontal platform with a large legacy of receivers with different capabilities”.
- 2.18 Arqiva argued that “the impact of Ofcom’s proposal would increase the regulatory burden on the DTT platform, damaging its ability to innovate and compete with all other platforms”, which “is not in the long term interests of the consumer and contrary to Ofcom’s duties to encourage competition and support diversity of choice”. Arqiva said that Ofcom should have raised any specific concerns about the DTT platform with the relevant bodies and stakeholders ahead of the consultation process, offering the industry an opportunity to resolve those concerns.
- 2.19 Arqiva, Five, Fusion Telecom and an individual respondent said that other potentially offensive and/or explicit material is as easy, if not easier, to find on general entertainment channels.
- 2.20 Five argued that Ofcom’s proposal “effectively singles out” Five and Partyland, as “the impact of it would be to force Partyland off Freeview and prevent [Five] subletting our capacity to adult chat or psychic TV channels in future”. Meanwhile, “the potential for consumer harm and offence would be largely unaffected – three other Participation TV channels similar to Partyland would continue to be broadcast on Freeview as they are licensed in the Netherlands and therefore outside Ofcom’s jurisdiction; while Freeview channels transmitting editorial material that may well be as offensive to viewers are outside the terms of Ofcom’s proposal”. Five further argued that “it makes rather a mockery of [Ofcom’s] proposals if viewers can continue to receive several similar services on Freeview after Ofcom has effectively banned just the one service licensed in the UK. Arguably, UK viewers’ interests would be much better served through maintaining tightly regulated UK licensed services on Freeview than through effectively encouraging such services to relocate in order to be licensed in a Member State where regulation is less restrictive”.
- 2.21 Five also felt that Ofcom should consider the effect on its revenues, since subletting its capacity to PTV channels provides Five with a “modest financial benefit” which indirectly helps pay for its public service broadcasting obligations. Five did not quantify this financial benefit.
- 2.22 There was support for Ofcom’s proposals from Channel 4, Box Television and UKTV.

### **Ofcom response**

- 2.23 *In Ofcom’s research,<sup>6</sup> most participants in the research considered that Adult Chat PTV promoting PRS of a sexual nature was acceptable provided the channels were labelled as ‘Adult’ and placed in an appropriate section of an EPG, so they would not come across it unintentionally. To address the concerns expressed for viewers, the consultation therefore proposed measures to ensure appropriate labelling and separation of Adult Chat PTV services. This would allow viewers to avoid chancing upon this content on general entertainment channels and, if they chose, to use parental PIN controls to block viewing of either individual channels or the entire Adult EPG section.*

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<sup>6</sup> <http://www.ofcom.org.uk/consult/condocs/participationtv3/research>

- 2.24 *Participants in the research further considered that Adult Chat PTV featuring telecommunications based sexual entertainment services should 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. We consider that this particular concern related not to the DTT platform itself, but to the fact that it currently lacks the EPG information and controls other platforms afford viewers. Our proposals did not therefore seek to impose particular restrictions for Freeview or other DTT operators per se but rather for any platform unable to provide appropriate labelling and separation.*
- 2.25 *As noted in the consultation, following a restructuring of the DTT EPG by DMOL in 2009, Adult channels, including Adult Chat PTV, are grouped together from Channel number 93, towards the end of the EPG. The consultation considered that although this may reduce the risk of unintended viewing, it would not, in our view, allow sufficient labelling and sign-posting for viewers to address the viewer concerns raised in the research. However, the consultation recognised that if a segregated EPG were implemented on DTT in the future, it is possible that channels wishing to broadcast on the platform could satisfy the principle in time.*
- 2.26 *Ofcom has carefully considered each of the responses, and in particular sought further clarification from Arqiva of its proposals to introduce 'book end slates', and (as also proposed by Five) clearer labelling of adult sex chat services.*
- 2.27 *Arqiva's proposal seeks to improve labelling and sign-posting on the DTT EPG. The proposal suggests prefacing Adult Chat PTV channel names with the word 'Adult'. Additionally, by way of example, Arqiva proposes that the 'book end slates' – which would appear on screen whenever a viewer scrolled up or down into the adult section of channels – could read "Adult Section. Channels 93-99. This content may offend and is for viewers over the age of 18 only".*
- 2.28 *Ofcom considers that, if such a proposal were implemented, channels carried on DTT would be able to meet the proposed Advertising Code requirement that such channels "are appropriately positioned and labelled within an 'Adult' or similar section of an Electronic Programme Guide". We understand from Arqiva, and the channel allocation body DMOL, that the proposal would have the added benefit of placing Adult Chat PTV channels licensed elsewhere in the EU in this section of the EPG, as well as those channels licensed by Ofcom.*
- 2.29 *However, the consultation also noted (at paragraph 6.26) that viewers considered that, in order to ensure the appropriate protection of minors, Adult Chat PTV channels should only be permitted on platforms where parental PIN control was available. There is no research we are aware of on how many DTT set top boxes and integrated receivers presently in use in the UK have these controls. AIME's response suggested that, in their research on DTT receivers currently retailed, controls are available on the majority of DTT boxes and integrated receivers. However, it is possible that a significant proportion of DTT set top boxes in use would not afford PIN protection for use by viewers to block access to certain channels. By contrast, Sky, Virgin Media and Freesat boxes are equipped in this way due to manufacturer specifications.*
- 2.30 *We note that as DTT set top boxes only require a terrestrial aerial, they are often used as second-set receivers and therefore more likely to be in use in childrens' bedrooms. We also note that given that the number of channels on DTT is smaller*

*than on other platforms, unintended or accidental access to channels may be greater than on other platforms.*

- 2.31 *Therefore we consider that although sufficient labelling and sign-posting to inform viewers on DTT can be achieved, an additional safeguard is required to limit the risk of offence to viewers, and protection of minors.*
- 2.32 *We noted in the consultation that the Advertising Code requires that advertisements which refer to sexual matters or portray sexual activity are not scheduled before 2100 or after 0530. It also requires that broadcasters exercise responsible judgement in the scheduling of advertisements that could distress or offend viewers, with guidance that advertisements that are unsuitable for children must be subject to restrictions on times of transmission to minimise the risk that children will see them.*
- 2.33 *Promotion of telecommunications based sexual entertainment services is therefore restricted to 2100-0530 on Adult Chat PTV services on most platforms. However, for the reasons given above, we consider that a stricter timing restriction should be introduced for DTT: that adult sex chat services should be allowed only between midnight and 0530 hours. We consider that this timing restriction would minimise the risk of children being available to view or chance upon the content, and reflects current broadcasting practice in the industry which, in responses, stakeholders have advised is in the interest of the protection of viewers.*
- 2.34 *We are not aware that, given the current broadcasting hours of UK-licensed Adult Chat PTV services on Freeview, there would be any commercial impact from this restriction on UK-licensed channels. Although not subject to the UK Advertising Code rules, we are aware that Adult Chat PTV services licensed elsewhere in the EU broadcast on Freeview at similar hours. We therefore do not consider the timing restriction would disadvantage UK broadcasters. Five, in its response, accepted that a differential timing restriction such as this might be appropriate.*
- 2.35 *We therefore consider that it may be possible for channels carried on DTT to meet the requirements for labelling and segregation that we have proposed, and there is therefore no need to reconsider the requirements in relation to labelling and segregation which were proposed in the consultation. However, given that possibility, it will be necessary to amend our proposed draft of the Advertising Code, by introducing a requirement that adult sex chat services may only be carried on DTT between midnight and 0530 hours, instead of the 2100-0530 window on other platforms.*

## **Simulcasting of Psychic PTV services**

### **Summary of comments**

- 2.36 Under the proposed Advertising Code rules set out in the consultation document, in order to promote live psychic PRS, Psychic PTV channels would need to be “appropriately positioned and labelled within a ‘Specialist’ or similar section of an EPG” on any platform.
- 2.37 We recognised that the rules as proposed would mean that only channels within an appropriate EPG section would be able to promote such services, and that this would prevent ‘simulcasting’ (where the content of one channel is broadcast at the same time on another channel) or ‘windows’ of such content featuring on general entertainment channels outside of this EPG section.

- 2.38 Several stakeholders felt that Ofcom had failed properly to understand the importance to Psychic PTV channels of being able to simulcast their content on general entertainment channels. PTVBA, MX Telecom, Majestic TV (which operates the channel known as Psychic TV), and a group of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) argued that a rule prohibiting simulcasting could make the Psychic PTV unviable as the continued operation of Psychic PTV broadcasters is dependent to simulcast on non-PTV broadcasters.
- 2.39 Wedding TV and TV You – companies operating entertainment channels which simulcast Psychic PTV content – as well as PTVBA indicated that channels which simulcast Psychic TV content would also be disadvantaged by the proposed rule.
- 2.40 Stakeholders including AIME, Com and Tel, MX Telecom, and TV You questioned the need for the rule, in the absence of significant consumer harm or widespread complaints. Com and Tel argued that, as children tend not to be interested in Psychic PTV, there is no need to restrict Psychic PTV to dedicated channels.
- 2.41 TV You said that no other EU member state has imposed restrictions on simulcasting Psychic PTV services.
- 2.42 AIME, Com and Tel, and TV You all argued that there is a distinction between ‘occult services’ and Psychic PTV, and that the latter does not cause much concern to consumers. AIME suggested developing a classification of Psychic Entertainment Services – including live and recorded psychic, horoscopes and tarot – that are allowed to be advertised, to stress this differentiation.
- 2.43 Both AIME and Com and Tel said that (non-participatory) psychic entertainment content was available on mainstream channels, such as Psychic Detectives on Sky 3, and that this content is not restricted by regulation.
- 2.44 AIME and Com and Tel also felt that Psychic PTV services should not be restricted from spot advertising, so long as the advertising is placed in context (e.g. alongside psychic editorial material). AIME consider that spot advertising for popular psychic entertainment services could be extended to free to air broadcast on other channels in order to promote consumer traffic to dedicated digital channels where Psychic PTV facilities are operated. Com and Tel said that spot advertising for Psychic PTV services is common in other European states.
- 2.45 Com and Tel argued that since there is no dedicated ‘Psychic’ EPG category, there is no benefit to restricting Psychic PTV to a particular category.
- 2.46 One individual respondent felt that consumers should be able to exercise freedom of choice over whether or not to participate in Psychic PTV services.
- 2.47 MX Telecom pointed to the prevalence of psychic entertainment services in newspapers as evidence of a ‘general acceptance of this form of entertainment’.
- 2.48 There was support for Ofcom’s proposals from Channel 4, Box Television and UKTV.
- 2.49 Another individual respondent supported Ofcom’s position, arguing that children and vulnerable people need to be protected.

## Ofcom response

- 2.50 *Ofcom had previously sought and considered data from psychic TV operators, relating to the ending of simulcasting on general entertainment channels. The consultation document (in paragraph 7.44) and impact assessment (in paragraphs A8.41 and A8.43) acknowledged that operators' revenues would be adversely affected for this reason, as might revenue for other broadcasters carrying simulcasts (albeit that this might be offset by alternative content available). However, in light of the emphasis placed on this issue by respondents, Ofcom sought further data from the two psychic PTV channels – Watch Me TV and Psychic TV – and from broadcasters who simulcast Psychic PTV content.*
- 2.51 *Psychic TV supplied information in response to the information request. Watch Me TV (broadcaster of Psychic and Soul) did not respond to the request.*
- 2.52 *Psychic TV stated that simulcasting their service on other channels with higher EPG positions (in the general entertainment and lifestyle EPG sections) generates a significant share of total call volumes/revenues. Psychic TV considers that without this arrangement the main service would not be viable.*
- 2.53 *We note that Psychic TV were unable to identify the actual number of calls attributed to simulcasts rather than the main channel. Psychic TV provided figures based on estimates of the share of total call volumes to each channel as call volumes appear higher when a simulcast channel is in use. The data supplied by Psychic TV therefore suggests that the volume of calls does increase when simulcasts are in place, but it has not been able to demonstrate that these calls are entirely additional i.e. that they would not otherwise have been prompted via Psychic TV.*
- 2.54 *We note from the information supplied that the loss of the fees from simulcasting could be important in relation to a simulcasting channel's overall turnover. However, we note that, in general, arrangements for simulcasting are based on either informal agreements or short-term rolling contracts. Therefore, we do not consider that the fees from simulcasting are a long-term or guaranteed source of income, or that channels could not consider simulcasting other content.*
- 2.55 *However, based on the information supplied, Ofcom accepts that a restriction affecting the simulcasting arrangement could cause some loss of revenue from calls generated from simulcast viewing, and the loss of payments from Psychic PTV to simulcasting broadcasters as set out in the Impact Assessment to the consultation. Although we accept there could be some reduction in revenues for both parties, we do not think it conclusive that the services would be unviable.*
- 2.56 *In the light of these submissions, Ofcom has considered whether the restriction of Psychic PTV services to the 'Specialist' area of an EPG is proportionate to its policy aims. In particular, we have considered the protection for viewers that this restriction affords, alongside other elements of the proposed rule.*
- 2.57 *The research conducted for the PTV consultation suggested that participants did not want themselves, or vulnerable viewers who may not otherwise seek out the services, to stumble across promotion of Psychic services in general entertainment channels.*
- 2.58 *In the consultation document (paragraph 6.30) we noted that the concern expressed by some participants relates in part to the psychic PRS product itself. Most*

*participants had not had direct experience of the products; they considered such products not to be genuine, but a harmless form of entertainment. However, some participants considered them to be potentially harmful to vulnerable people. On this basis participants felt that they should not be promoted widely on TV, where vulnerable viewers might stumble across them, but were content for them to be promoted on a clearly labelled dedicated TV service.*

- 2.59 *We have considered the issue of risk of harm to vulnerable people from promotion of psychic PRS products. In respect of the products themselves, consumers are protected in the use of live PRS by the relevant PhonepayPlus rules for providers, which are also included in the Advertising Code. These include the prohibition of use of live PRS by under-18s, and that live PRS providers promoting on TV may only operate with prior permission from PhonepayPlus, who have oversight of the services promoted.*
- 2.60 *Ofcom also proposed rules in the Advertising Code aimed at preventing harm to consumers. Under the advertising rule as proposed in the consultation, promotion of psychic PRS on TV would be limited to non-harmful practices (e.g. horoscopes, tarot readings) that are clearly marked for entertainment purposes only. Ofcom has received no evidence of harm for these particular types of psychic reading, which are legal and widely advertised in other media. We therefore consider, on current evidence, that the risk of harm from promotion of these particular products is small.*
- 2.61 *The concern expressed by participants in the research also relates to risk of offence from chancing across Psychic content on TV. Most participants had not previously been viewers of Psychic TV content. Some participants considered that Psychic TV content included beliefs or practices that they thought could be offensive.*
- 2.62 *Whilst we recognise that certain viewers may have objections to the Psychic PRS line itself, the content of programming is unlikely in itself to be offensive to viewers. We therefore consider that, provided that content complies with the rules governing standards on television (which it would be required to do under the proposed rules), it is not proportionate to restrict freedom of expression in this regard. We note that there have been no upheld complaints to date from viewers on the standards of Psychic PTV content – either on the two main channels, or simulcasts.*
- 2.63 *Taking these factors into account, we will therefore amend the proposed rule, to remove the requirement to be positioned in a 'Specialist' section of an EPG.*
- 2.64 *However, we consider that the conditions of the rule that broadcasters wishing to promote psychic practices, either on entire channels or in teleshopping windows, should ensure that such content is labelled as such and are licensed for the purpose of promotion should be retained. We consider that labelling information should make clear the nature of the content i.e. featuring psychic practices. This will allow viewers to make an informed viewing choice, and for channels wishing to promote psychic PRS to be clearly identified. Such a rule will ensure that, to the extent that there may be any risk of offence for viewers, they are able to identify those channels which are broadcasting Psychic PTV material and are able to choose not to view such material. Ofcom will also monitor the products featured and the way in which they are advertised.*
- 2.65 *The rule itself does not preclude channels licensed for the purpose of promoting psychic services from broadcasting content of other kinds.*



- 2.66 *We agree that there is a distinction between occult practices, and the material offered by existing psychic TV channels. Our proposed rule is clear in disallowing the former whilst allowing the latter, and we consider that the proposed rule is clear both on psychic practices and the manner in which they may be promoted. However, we do not agree that psychic programmes of the kind carried on other editorial channels, which are not subject to specific regulation, are analogous. Most obviously, they do not promote paid-for, individualised consultations.*
- 2.67 *We are firm in our view that the current ban on spot advertising for psychic services should be retained. We do not accept that the fact that some editorial content might deal with psychic topics would give sufficient grounds to allow spot advertising for psychic PTV channels or the services they promote on mainstream channels, and consider that to allow this would be contrary to the policy and rules as set out. Our research showed strong support for continuing with this restriction.*

## Relaxing the current terms of the TV Advertising Code

### Summary of comments

- 2.68 The Broadcast Committee of Advertising Practice (BCAP), the industry body with responsibility for writing and maintaining the Broadcast Advertising Codes, recommended to Ofcom that its existing rules in relation to both adult sexual chat and psychic services should be continued. The rules restrict the former to encrypted elements of adult entertainment TV channels, and prohibit the latter with limited exceptions; they apply both to spot advertising, and to long-form advertising/teleshopping.
- 2.69 BCAP had itself consulted on revisions to the Advertising Code<sup>7</sup>. Whilst it had not made any recommendations for changes to its rules on Adult Chat PTV and Psychic PTV, it recognised that Ofcom would be consulting on proposals to changes to the Broadcasting Code of particular significance to such services predicated on the promotion of PRS and had raised these issues for comment in the consultation<sup>8</sup>. BCAP requested that Ofcom should take account of responses to its consultation in considering the appropriate regulation of such services in Ofcom's consultation.
- 2.70 BCAP's response argued that Adult Chat content has included very strong sexual content that exceeds generally accepted standards on unencrypted TV services; that 'channel flicking' continues to be the primary way of locating channels; and that research indicates children can access sexual material and actively seek it out.
- 2.71 BCAP also quoted from Ofcom's June 2009 research, *Attitudes Towards Sexual Material on TV*, and its conclusion that there was a "need for mandatory access restrictions for content perceived to be for the primary purpose of sexual arousal". BCAP considered that where TV broadcast material has little or no editorial merit, and the primary purpose of the broadcast material is sexual arousal, the case for mandatory access restrictions appears to be strongest. BCAP considered that the

<sup>7</sup> <http://bcap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx>

<sup>8</sup> Paragraphs 15.32 to 15.34 of the BCAP Code Review Consultation

proposed changes to the Advertising Code would allow such content to be featured in advertising on unencrypted channels.

- 2.72 BCAP proposed to maintain the Advertising Code's more stringent restrictions also on psychic material, arguing that research indicates psychic services can directly harm consumers by causing them to engage in lengthy and repeated consultations through premium-rate lines, incurring substantial call charges; research indicates these services have the potential to cause indirect harm by discouraging vulnerable individuals from seeking more suitable professional help; that advertisements for psychic and occult products, particularly live, long-form broadcast formats, have the clear potential to mislead viewers (BCAP pointed to the lack of evidence to support the efficacy of psychic and occult techniques); and that the power of TV advertising validates or otherwise lends a weight of credibility to a product or service that research indicates could cause harm to the vulnerable members of the audience. BCAP therefore considered that continuation of the pre-cautionary approach as under the current rules to advertising of psychic products was appropriate.

### Ofcom response

- 2.73 *Ofcom has made changes to the Broadcasting Code to clarify where promotion of PRS is editorial or advertising. These changes mean that services promoting PRS lines may no longer continue to be regulated as editorial content under the Broadcasting Code. If, as BCAP proposes, the Advertising Code were to remain unamended, Psychic PTV services would be unable to continue as advertising and Adult Chat PTV services would only be able to promote telecommunications based sexual entertainment services behind encrypted elements of adult channels. This would have significant financial impact on the 25 or so adult sex chat and psychic services that are currently operating.*
- 2.74 *BCAP express concern that some adult sex chat services may currently breach the requirements of the Broadcasting Code in relation to avoidance of offence from sexual material. Where breaches of the Ofcom Broadcasting Code occur, Ofcom has taken firm regulatory action in relation to these particular broadcasters. It would not, in our view, be proper in effect to enforce closure of all operators in a particular field, as a response to the transgressions of some. Moreover, programming on Adult Chat PTV will continue to be subject to the requirement not to "cause serious or widespread offence against generally accepted moral, social or cultural standards, or offend against public feeling" in accordance with Rule 6.1 of the Advertising Code. This provision is comparable with Rule 2.1 of the Broadcasting Code which requires broadcasters to apply generally accepted standards so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material. As a result, Adult Chat PTV will continue to be required to comply with rules relating to offence under the Advertising Code.*
- 2.75 *Ofcom does not consider that, to date, the primary purpose of adult sex chat services has normally been sexual arousal. In our judgement, the primary purpose is the generation of calls to the PRS lines. The content must be less sexually explicit than what is permitted on encrypted services with mandatory access restrictions. Where the content goes beyond the rules of the Codes in relation to offence, and its primary purpose appears to be sexual arousal, Ofcom has taken and will continue to take very robust regulatory action.*
- 2.76 *BCAP's concern about psychic services relates to areas of harm. While psychic services may give rise to concerns about moral harm, no evidence of such harm is*

*known to Ofcom. Our research indicates public tolerance of the services continuing, subject to certain safeguards. These include clear information about call charges, to alert consumers to the financial harm that may result. In this respect, Rule 5.7 of the PhonepayPlus Code of Practice requires service providers to ensure that all users of PRS are “informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge” and that pricing information must be clearly presented. Ofcom is not proposing to make amendments to Rule 11.1.1 of the Advertising Code which would continue to require compliance with the PhonepayPlus Code of Practice.*

- 2.77 *Ofcom notes the submissions to BCAP’s consultation, to which BCAP has drawn attention. However, it seems to Ofcom that these responses were predominantly directed towards maintaining the current restrictions on spot advertising for adult sex chat and psychic services – restrictions with which Ofcom wholly agrees and will continue – rather than preventing in future the long-form content which currently exists. Similarly, the Byron and Buckingham Reviews cited by BCAP referred to the importance of maintaining safeguards for children, rather than arguing that adult sex chat and psychic services which are currently permitted should be closed down.*
- 2.78 *We therefore intend to amend the Advertising Code, in the way proposed in our consultation document (with the exceptions described above), thus permitting long-form advertising for adult sex chat services (subject to timing restrictions) and for certain live psychic services.*

## Separation of advertising from editorial content

### Summary of comments

- 2.79 A number of respondents submitted comments regarding the principle of making a separation of advertising from editorial content, and the extent to which certain services should continue to be regulated under the Broadcasting Code.

### Ofcom response

- 2.80 *The consultation contained Ofcom’s conclusions - that European and UK law require Ofcom to distinguish between editorial and advertising - and a regulatory statement on changes to the Broadcasting Code following previous consultations. Stakeholders were provided with an opportunity to comment on Ofcom’s proposed changes to the Broadcasting Code during the course of those consultations. The consultation and statement sought views from stakeholders on proposed changes to the Advertising Code only in relation to Adult Chat and Psychic PTV services. In light of this, Ofcom does not consider it appropriate to comment further on matters on which it has already reached its conclusion in a published statement.*

## Payment mechanisms

### Summary of comments

- 2.81 Several stakeholders objected to Ofcom’s suggestion that editorial programmes may only charge for participation or interaction by means of PRS or similar telephony services.

- 2.82 AIME, Com and Tel, and a group of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) felt that any restriction on payment mechanisms would be anti-competitive and would unfairly limit consumer choice. Questico said that more than 95% of its German revenue is billed via alternative payment methods, and that billing through PRS would require Questico to use UK telephone companies rather than its own billing service.
- 2.83 AIME and MX Telecom said that the rule would undermine the principle of 'technological neutrality', and that Ofcom should set standards rather than prescribe technical means.
- 2.84 Fusion Telecom, along with a group of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) questioned the need for such a rule in the absence of widespread consumer harm or complaint.
- 2.85 Questico felt that the rule was contrary to Ofcom's aims, as alternative payment methods can offer greater transparency consumer protection than PRS. The PRA pointed out that consumers must be aged 18 or over to acquire a credit card.
- 2.86 The PRA and PTVBA questioned Ofcom's legal authority to prescribe alternative methods of payment.
- 2.87 However, the PTVBA noted and welcomed that channels broadcasting as teleshopping, because they are subject to the Advertising Code, would not be subject to any constraints regarding the method payment.
- 2.88 There was support for Ofcom's proposals from Channel 4, Box Television and UKTV.

## Ofcom response

- 2.89 *Many respondents seemed to object to Ofcom's proposal, on the grounds that this would adversely affect broadcasters of PTV content, the primary purpose of which is the promotion of paid interactive content. This is not the case: due to the changes in the Broadcasting Code such content may in the future be classified as teleshopping and regulated under the Advertising Code. Under this Code no restriction as to choice of payment mechanisms applies, provided services comply with the rules for promotion of premium rate services (Section 22).*
- 2.90 *For the reasons set out in the consultation, we consider that it remains appropriate that editorial programmes may only charge for participation or interaction by means of PRS or similar telephony services. Ofcom's powers under the Communications Act permit it to restrict choice of payment mechanisms for paid interaction with editorial content.*

## Requiring EPG providers to regulate PTV

### Summary of comments

- 2.91 Sky, as an EPG provider, felt that Ofcom's proposed amendments to the Advertising Code are flawed as they rely on EPG providers to list Adult and Psychic PTV

services in particular areas of the EPG, while “EPG providers are under no regulatory obligation to list channels in any particular genre, but merely to allocate EPG listings in accordance with an objectively justifiable methodology”.

- 2.92 Sky felt that “Ofcom is effectively devolving responsibility for regulating these channels to EPG service providers”.
- 2.93 Sky further argued that, since EPG providers rather than broadcasters decide on channel positions, “broadcasters could find themselves inadvertently in breach of the Advertising Code should an EPG provider decide (appropriately, in accordance with the relevant listing methodology) to list their channel in a genre other than Specialist or Adult, or should the EPG provider cease to list channels according to these particular genres”.
- 2.94 Sky said that the proposed rule changes were not clear about whether Adult or Psychic PTV channels would be permitted to broadcast other types of content. It said a situation may arise whereby, for example, a channel consisted of 50% gaming content and 50% Psychic PTV content. Such a channel might be listed in the ‘Gaming’ section of Sky’s EPG and therefore breach the Advertising Code.
- 2.95 Harvan Europe Ltd, which provides SMS services to Adult Chat PTV suppliers, argued that there is no history of Ofcom mandating the organisation of channels on EPGs. Com and Tel suggested that the rule changes could set a dangerous precedent and an impediment to new platforms.

### Ofcom response

- 2.96 *Ofcom considers that Sky’s response raises two issues. Firstly, the extent to which the revised Advertising Code rules could be considered to act as a form of regulation on EPG providers. Ofcom does not consider that the proposed changes would have this effect. The Advertising Code rule changes effectively require Adult Chat PTV broadcasters wishing to promote telecommunications based sexual entertainment services to ensure that their channels are listed in an appropriate position in the EPG. EPG providers are not placed under an obligation to list such channels in any particular position. Neither are EPG providers required to ensure that channels are not broadcast if they do not comply with the Advertising Code rules. Where this is the case, the obligation falls on the broadcaster and any action for breach of the Advertising Code would be taken against the broadcaster.*
- 2.97 *Sky’s second point appears to be that the EPG provider should not find itself acting as a de facto regulator of Adult Chat PTV services according to its channel listing policy. Sky considers that there may be situations where the listing policy changes so as effectively to force certain channels to cease broadcasting. Ofcom agrees that the Advertising Code rules should not place an EPG provider in a position where it is acting de facto as a regulator, in allocating positions on the EPG. However, we would not agree that Ofcom’s proposal places an EPG provider in this situation. Ofcom’s use of the phrases “adult or similar” and “specialist or similar”, in the proposed Advertising Code, acknowledges that EPG providers may in the future wish to change their allocation genres. It would then be for the broadcaster to determine whether the revised channel listing remained compliant with the provisions of the Advertising Code. We find it unlikely that a broadcaster could inadvertently find itself in breach of the Advertising Code, as a result of an EPG provider changing classification of a channel, without notifying the channel or without the broadcaster otherwise becoming aware of this. However, should such a situation arise in the*

*future, we would consider whether any regulatory action against the broadcaster might be required.*

- 2.98 *Sky raises a valid point about the difficulty of classifying channels which may mix psychic with other content. As set out above, Ofcom has concluded that it is not appropriate to include a requirement in the Advertising Code which would require Psychic PTV channels or channels simulcasting Psychic TV content to be listed in any particular position in the EPG, and therefore this concern no longer arises.*

## Encryption of Adult Chat PTV services

### Summary of comments

- 2.99 Ofcom's proposed revision to the Advertising Code states that advertising for telecommunications-based sexual entertainment services is only acceptable on encrypted elements of adult entertainment channels, or 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 EPG. A number of stakeholders raised concerns about the reference to "encrypted elements of adult entertainment channels".
- 2.100 Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, and The Other Side felt that there is no longer any need to retain the restriction relating to encrypted elements of adult entertainment channels. AIME said that any stipulation requiring the use of encryption technology would not be technologically neutral.
- 2.101 Sky was concerned that it is not clear what Ofcom means by "encrypted elements of adult entertainment channels" in this context. It felt that Ofcom should clarify whether a service which is available on a 'free to view' basis (with a mandatory PIN) would qualify. The proposed rule says that 'encrypted elements of adult channels' will be interpreted with reference to rule 1.24 of the Broadcasting Code, but a channel that is encrypted on a 'free to view' basis would not be able to comply with all of the measures required by that section of the Broadcasting Code. For example, a detailed billing system which itemises all viewing would not be appropriate for a channel that is not provided on a subscription or pay per view basis.
- 2.102 Sky and one broadcaster felt that paragraph A7.32 of the consultation document, referring to its encryption services, inaccurately reflects the terms and prices of such services.

### Ofcom response

- 2.103 *The Advertising Code presently allows the promotion of telecommunications-based sexual entertainment services on encrypted elements of adult entertainment channels only. That restriction has stood for a number of years. Where referred to in this document, "encrypted" channels or "encrypted" elements on those channels, Ofcom means the same as "mandatory restricted access" as defined in Rule 1.18 of the Ofcom Broadcasting Code (the updated numbering is from the revised Code of December 2009).*
- 2.104 In essence, for a service to carry stronger adult-sex material it must be protected by a mandatory PIN each time the service is accessed and the licensee must operate



further measures to ensure that the subscriber is an adult. In practice this means that a registration process is imposed. For conventional 'adult' subscription channels this raises no problem as the use of a credit card registration system for payment will discharge the requirement.

- 2.105 *The need for a detailed billing system applies only to pay per view services.*
- 2.106 *The restriction contained in the proposed rule of the Advertising Code – and summarised above – covers spot advertising and any other advertising format. Because of this, we do not believe any change is called for or that the continuation of the rule conflicts with anything in this Regulatory Statement. Ofcom would stress that the latitude given by the Code to the strength of sex material on services that meet the mandatory access requirements of Rule 1.18 does not apply to unencrypted 'adult chat' services, or any other service not fulfilling the requirements.*
- 2.107 *Were licensees to seek to meet Rule 1.18's requirements (and so be able to offer stronger sexual material) but in a way that did not attract a subscription payment and was funded by PRS calls, Ofcom expects that the mandatory PIN and registration process would continue to apply. This would be likely to mean that registration of a credit card or other substantive proof of age would be required, albeit that no payment would be taken. We are willing to advise further on an individual basis.*
- 2.108 *We note Sky's observations about the costs and terms of encryption as given in paragraph A7.32 of the Consultation Document, and accept that the costs of encryption may be less than estimated in our Impact Assessment. However, given Ofcom's overall view about the policy direction that should be adopted, which does not restrict promotion to encrypted channels only, this does not have bearing on the proposed changes to the Advertising Code rules.*

## Self- or co-regulation

### Summary of comments

- 2.109 PRA, Questico, and a group of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) suggested that a self-regulatory or co-regulatory model would be appropriate for Adult and Psychic PTV. The PTVBA felt that it would be "ideally positioned to fulfil this role".

### Ofcom response

- 2.110 *Ofcom is required by s.319 and s.3 of the Communications Act to ensure that appropriate standards are in place for licensed broadcast services. Ofcom supports co-regulatory arrangements where practicable to deliver this. However, as these particular genres of PTV have required considerable oversight in the application of related rules in the Broadcasting Code, we do not believe that at present a co-regulatory arrangement could command sufficient confidence among viewers, consumers, other parts of the industry, and Ofcom.*

## Retain restrictions on Adult Chat PTV

### Summary of comments

- 2.111 Mediawatch-UK felt that the only way to offer adequate protection to viewers is to ensure that all Adult Chat PTV is encrypted. It argued that Adult Chat PTV services have been found in breach of the Broadcasting Code on numerous occasions; that viewers could accidentally access Adult Chat PTV services quite easily; that children could access the channels (and that labelling might encourage them to do so); and that protecting children and vulnerable people from harm, and general viewers from offence, is more important than Adult Chat PTV broadcasters' financial viability.
- 2.112 OBJECT, a human rights organisation that "challenges the increased sexual objectification of women", argued that Ofcom's assessment of stakeholders did not take into account the effect of Adult Chat PTV on women who work in the industry, or on women in society. It said that "treating a human being as a 'thing', a commodity, means that they are denuded of humanity such that abuse becomes acceptable", and that the sexual objectification of women and girls is linked to low self-esteem, eating disorders, bullying, damaged sexual relations, and an increased prevalence of plastic surgery.
- 2.113 A broadcaster, whose response is confidential, said concerns about children, and adults who might be offended, would not be fully resolved by Ofcom's proposed rule changes. It said that Ofcom should consider a later restriction than 9pm, and should ensure that free-to-air Adult Chat PTV services are only available on EPGs with a parental PIN function. It also suggested that Ofcom consider a mandatory PIN either for all Adult Chat PTV channels, or for those broadcasting before 11pm. The broadcaster felt it was inappropriate for Ofcom to relax prohibitions on advertising adult PRS given that Adult Chat PTV services have breached the Broadcasting Code on a number of occasions, and that increased competition between such services was likely to lead to more breaches in future.
- 2.114 An individual respondent disagreed, arguing that "it is clear that if [Adult Chat PTV] is stopped or limited to encrypted channels then these channels will die. If that happens the demand for sexual stimulation will inevitably be met by more mainstream channels, which may not be an outcome that the anti-lobby would welcome".

### Ofcom response

- 2.115 *Ofcom notes the arguments made by Mediawatch and the broadcaster. However, our recent research shows that viewers are content for Adult Chat PTV promoting telecommunications based sexual entertainment services to continue on an unencrypted basis, provided clear separation in the EPG and labelling are available to viewers, so that they do not come across such material unintentionally.*
- 2.116 *The issues raised by OBJECT fall outside the scope of this consultation, which is principally to do with the promotion on television of legally-available PRS chatlines. Ofcom considers that the effect on employees who wish to work in the industry is outside the scope of the consultation. Ofcom's research allowed participants to make concerns about the wider impact of Adult Chat PTV services known, and these have been set out and taken into account in the assessment of policy options. Ofcom makes judgments about broadcast content, on a case-by-case basis, according to the terms of the Broadcasting and Advertising Codes, and the principle of generally accepted standards.*



## Research

### Summary of comments

- 2.117 Some stakeholders, including Com and Tel, PTVBA and MX Telecom, expressed concern over Ofcom's qualitative research. They felt that the number of participants was too small to be representative; that the participants had little interest in Psychic PTV; and that the participants were unlikely to be aware that simulcasting was critically important to Psychic PTV operators' business models.
- 2.118 Five was concerned that "Ofcom's research, while providing a good general sense of what viewers find acceptable and what they are prepared to tolerate, did not ask respondents about their attitude to images and/or language of a strong or explicit sexual nature. It may well be that some respondents would have preferred similar restrictions to be placed on editorial content as on participation TV content; but we do not know, because respondents were not asked to compare the two".
- 2.119 Five also felt that "the research finding that respondents 'did not feel this type of long form promotion would be acceptable on Freeview' was derived from discussions about options for regulation put forward by the researchers that included 'must not be carried on Freeview' as one of the choices. Respondents were presented with this as a take-it-or-leave it option, with no suggestion of an alternative approach that might involve differential scheduling and/or labelling restrictions on Freeview. We believe this was effectively a leading question that put in the minds of respondents the possibility of a blanket ban on Freeview; it did not emerge spontaneously from discussions". Furthermore, Five said the research lacked "any attempt to differentiate the view of respondents in Freeview homes from homes with other platforms", and that it was conducted before the recent reorganisation of the Freeview EPG, which grouped Adult channels together.
- 2.120 Fusion Telecom, AIME and Com and Tel argued that it was inappropriate for Ofcom to reference its "Beyond Entertainment" document, which was published in 2001 and, they felt, no longer reflected society's views. Com and Tel said that, in 2001, "peoples' perceptions of Psychics were different, there was far less psychic content available either editorially or in advertising on television or via other mediums (e.g. there were no psychic lines in the daily newspapers, only recorded horoscopes) and the popularity of Psychics generally was much more fringe".

### Ofcom response

- 2.121 *As was made clear in the consultation document, the intention of our research was to take the views of the general public. We conducted research into the views of users of Psychic TV services in 20079.*
- 2.122 *Five is correct in saying that this research only explored viewers' attitudes to sexual offence issues in relation to participation TV content and not other programme content. However, Ofcom has recently conducted separate research into the latter<sup>10</sup>.*

<sup>9</sup> This research can be found at <http://www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf>.

<sup>10</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/sextv.pdf>

- 2.123 *We do not agree that the research was designed to suggest the prospect of a prohibition on Freeview. One of the restrictions proposed for discussion in the qualitative research was that content “must not be carried on Freeview”. This option was presented among a number of restrictions as a means to facilitate discussion and understand views. The discussion groups were composed of viewers using both DTT and other platforms. It was not appropriate or necessary to separate out responses in this way, on this kind of qualitative research. We do not believe it is necessary to undertake further research, simply because some channels have recently been grouped together on DTT. As suggested above, we have taken the research into account in our proposals, and have not concluded that services should not be available on DTT.*
- 2.124 *We have not relied to any significant extent on the ITC’s 2001 research ‘Beyond Entertainment’. Indeed, it is specifically stated that the fact this research related only to conventional editorial programming was a reason for commissioning our new research. The two substantive references to the ITC research merely refer to definition of and viewers’ objection to occult practices and life-changing advice – neither of which, as we understand it, operators would wish to provide.*

## Impact assessment

### Summary of comments

- 2.125 Com and Tel felt that Ofcom had not taken into account the true number of people whose livelihoods are affected by Adult and Psychic PTV, including third party suppliers, presenters, technical companies, live operators and consultants. Com and Tel say that thousands of jobs may be at risk.
- 2.126 Com and Tel felt that Ofcom had grossly underestimated the combined revenues of the Adult and Psychic PTV industries. It said that Ofcom had not asked all the relevant stakeholders for submissions; had concentrated on PRS revenues rather than total revenues including alternative billing methods and other services; and had not been able to include the new companies that had entered the market since the research was conducted. Com and Tel also claimed that the Ofcom consultation itself had constrained the growth of the market. A collection of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) felt that Ofcom had not engaged with Adult and Psychic PTV providers “in any meaningful way”, and instead had “paid lip service to the industry with the consultation processes and just continued with its own pre-determined agenda”.
- 2.127 Fusion Telecom strongly disagreed with Ofcom’s impact assessment, and did not feel that Ofcom had demonstrated a “complete understanding of the value chain”.

### Ofcom response

- 2.128 *In our description of the PTV industry in the consultation document (Section 6, paragraph 6.42 and 6.43) and the Impact Assessment (Annex 7 and 8) we explained that Ofcom is not in a position to assess the financial impact on each individual firm in the supply chain and therefore focussed on the key categories of stakeholders who are most directly affected. We also recognised that it is possible to describe the different stages in the industry value chain in different ways but we consider that the*

*approach adopted is sufficient to capture the essential elements of the value chain for the purposes of this consultation. None of the respondents have proposed an alternative framework for assessing the value chain.*

- 2.129 *We noted in the consultation that some members of the industry claimed that the scale of the sector is greater than Ofcom's research suggests, but that there has been no substantiation of these claims or indeed any explanation as to how they have been derived. None of the respondents provided further substantiation of the claimed estimates.*
- 2.130 *As Ofcom is an evidence-based regulator, we have endeavoured to collect information from the stakeholders identified as being directly affected. In the course of the consultation we issued information requests to stakeholders to gather data on the structure, economic models and finances of the industry. Given a worsening economic climate, we invited stakeholders to update this information in 2009. Some stakeholders opted not to return information, or supplied incomplete information. We consider that stakeholders have had the opportunity to provide information, representations and responses at a number of stages in the consultation process. Ofcom has met with both PTV broadcasters and their trade bodies on different occasions.*
- 2.131 *We therefore consider that the Impact Assessment was clear in its scope, the assumptions that were used and the restrictions of the analysis and was fit for the purpose of considering the impact of the policy options set out which concern the promotion of particular categories of PRS on TV only, and not the wider industry. Further, we consider that, as the rules set out in this statement will substantially allow PTV channels and their suppliers to continue to operate as they do today, any impact on the channels and the wider industry will be limited. None of the responses have suggested any consequence of the proposals that was not included in the Impact Assessment. Instead stakeholders have responded, and in some cases provided further information, to confirm the degree of impact from particular proposals which we have set out and taken into account above. We therefore consider that the Impact Assessment has fulfilled its purpose and does not need to be amended.*

## Other issues

### Summary of comments

- 2.132 Box TV and Channel 4 requested clarification in relation to proposed rules 10.9 to 10.11 of the Broadcasting Code. They asked whether competitions must be thematically linked to the programme, and whether the word 'programme' would cover strands such as T4 which contain more than one particular programme.
- 2.133 PTVBA believed that there may be a conflict between proposed rules 15.5 and 15.5.2 of the Advertising Code. Rule 15.5 states "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 15.5.2 states that "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." PTVBA suggest that, in the

event of a conflict between 15.5.2 and any other rule of the Code, the provisions of 15.5.2 should apply. PTVBA also asked for clarification of the word 'derivative' in rule 15.5.2.

- 2.134 A collection of PTV and PRS providers who submitted a joint response (Premier Communications, J13 Broadcast Ltd, Controversial TV, Psychic and Soul, Babeworld TV, House of Fun, The Other Side) felt "the industry must be consulted with in respect to the strength of content that will be allowable on Adult PTV programmes. There is nothing within the consultation document to explain what actual content OFCOM is proposing will be allowable if the channels are classified as advertising".
- 2.135 PRA felt the "definition of PRS as a product or service appears inaccurate as in reality it is a billing mechanism. This mechanism may deliver a product or service and, if as regulation currently states editorial must not have products or services offered in it, it would therefore suggest you would not be able to offer PRS in any TV show in the UK if the strict spirit of law was followed. Clearly this is not in the public interest and we would hope that Ofcom would not support this, certainly in light that it is a critical tool for mainstream TV to make revenue".
- 2.136 UKTV suggested that Ofcom should conduct further research once the rules have had time to 'bed in' to ensure that the rules offer adequate protection from harm.

## Ofcom response

- 2.137 *The general application of the new Broadcasting Code Rules for the use of PRS cannot be dealt with here at any length. The new rules set out where PRS can legitimately be used in programming i.e. where the primary purpose of the content is clearly editorial (and not advertising). This is to ensure that editorial programmes are not used as vehicles for advertising. In response to Box TV and Channel 4's specific question, when deciding whether the use of PRS is legitimate in programmes, Ofcom may take into account thematic links. However, this is only one aspect that may be relevant to the new rules. Others would include the proportion of editorial time given over to competitions and the degree of any undue prominence given to any particular brand in the competitions. This would apply both in the case of individual programmes and in respect of compilations of programmes such as T4.*
- 2.138 *As to the meaning of 'programme', Ofcom sees no reason for any change in policy in that respect and that the facts of each case must be examined carefully before a decision is reached about the application of the new rules in respect of commercial presence in programmes. We stated in our consultation on the Broadcasting Code<sup>11</sup> that "This section of the Code covers all commercial references that feature within television programming. Examples of television programming include programmes, trailers, Cross-promotions and sponsorship credits. "Programming" does not include advertisements."*
- 2.139 *We see no conflict between Rules 15.5 and 15.5.2. Rule 15.5 will continue to apply generally, subject to an exception for the categories of psychic service permitted under rule 15.5.1 and the new rule 15.5.2. We have amended the rule to make this clear.*

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<sup>11</sup> Available at <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

- 2.140 *'Derivative' in the context of Rule 15.5.2 means 'derived from'. We anticipate that practices derived from those mentioned in the rule will have essentially the same characteristics as those they are based on.*
- 2.141 *In respect of 'adult' standards, Ofcom does not envisage that adult-chat material will be subject to different standards when classed as advertising. In particular Adult Chat PTV will be subject to the requirement not to "cause serious or widespread offence against generally accepted moral, social or cultural standards, or offend against public feeling" in accordance with Rule 6.1 of the Advertising Code. This provision is comparable with Rule 2.1 and 2.3 of the Broadcasting Code in relation to offence. If required, as under the Broadcasting Code, guidance will be issued to assist interpretation and compliance with this rule.*
- 2.142 *As to the PRA's point, the new rules for the use of PRS do not proscribe the use of PRS, but remove some uncertainty. More generally, the issues raised by PTV and PRS providers concern interpretation of the existing terms of the Broadcasting and Advertising Codes and fall outside the scope of the current consultation.*
- 2.143 *UKTV's point is noted. We will consider in due course whether any further research is necessary, once rules are 'bedded in'.*

### Section 3

## Changes to the Advertising Code rules and next steps

- 3.1 In the 2009 consultation we proposed amendments to the existing rule 11.1.2 (telecommunications-based sexual entertainment services) and rule 15.5 (psychic practices) to the Advertising Code.
- 3.2 There were no detailed responses on the draft wording of these rules. The revised rules for the Advertising Code are therefore set out below.

### Revised rules for the Advertising Code

#### Revised rule on telecommunications-based sexual entertainment services in Advertising Code

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. On Digital Terrestrial Television, advertising for telecommunications-based sexual entertainment services must not be broadcast before 12am or after 5:30am.

*Note: Encrypted elements of adult channels are interpreted with reference to rule 1.18 of the Broadcasting Code.*

## **Revised rules on psychic practices in the Advertising 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 ouija, satanism, casting of spells, palmistry, attempts to contact the dead, divination, clairvoyance, clairsentience, the invocation of spirits or demons and exorcism.

### **Rule 15.5 – Television only**

Subject to rules 15.5.1 and 15.5.2, 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 labelled. 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.

## **Explanation of rule on telecommunications based sexual entertainment services**

- 3.3 The rules for promotion on encrypted channels remain the same: encryption is interpreted with reference to rule 1.18 of the updated Broadcasting Code. The revised rules will make promotion of the particular service on a non-encrypted channel conditional on the channel being licensed for this purpose and appropriately labelled and positioned within an Electronic Programme Guide.
- 3.4 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 condition 1 ii) of the rule. This purpose must be set out by licensees in the Annex to their licence, either at the time of application or by amendment. This purpose need not be exclusive.
- 3.5 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.
- 3.6 We consider that the proposed rule would mean that only those non-encrypted channels within an ‘Adult’ EPG section or grouped in the EPG with appropriate separation from other services would be able to meet the conditions for promotion. We do not consider that other sections of the EPG, for example ‘Entertainment’, would meet the conditions for promotion: promotion of telecommunications-based sexual entertainment services cannot therefore be simulcast or carried on channels outside the Adult section of the EPG. Where channels wish to simulcast or show ‘windows’ that meet the terms of the rules these channels must also be appropriately positioned in the same way as dedicated services. Telecommunications based sexual entertainment services cannot be advertised in either long-form or short-form (spot advertising) on channels not meeting the conditions of the rule.
- 3.7 As discussed in Section 2, we accept that a new configuration of the DTT EPG – where Adult Chat PTV channels are grouped toward the end of the EPG between ‘bookend slates’, and labelled using an “Adult” prefix – constitutes appropriate positioning and labelling and would meet the conditions of the rule. For the avoidance of doubt, if this configuration is not in place for any reason, the broadcasters will not be able to comply with the rule for promotion.
- 3.8 Due to the different capabilities in terms of EPG display, parental controls and blocking of channels on set top boxes available since launch, we consider that additional protection is required on DTT. The rule therefore prohibits advertising of telecommunications based sexual entertainment services on DTT, except between midnight and 0530, when children and general viewers are less likely to be using the platform. Outside of these hours, broadcasters would only be able to promote non-sexual telecommunications services, and should take into account the Advertising Code rules on appropriate content and scheduling of advertising.
- 3.9 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.



- 3.10 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.
- 3.11 Following introduction, the arrangements will be monitored carefully to ensure they provide the protection envisaged by Ofcom. Stakeholders should be aware that if they do not, or rules are not adhered to, then the rules may be subject to review and/or stricter conditions.

### **Explanation of rules on psychic practices**

- 3.12 The revised rule would maintain the general rule (15.4) for television advertising of psychic services, but make clear that this is subject to the exceptions set out in 15.5.
- 3.13 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 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 and labelling of the services.
- 3.14 We consider that “channels licensed for the purpose of promotion” would mean that only channels licensed for teleshopping could meet the conditions for the rule. This purpose must be set out by licensees in the Annex to their licence, either at the time of application or by amendment. This purpose need not be exclusive, and the channels may feature other content. However, the services permitted under rule 15.5.2 may be advertised in long-form teleshopping<sup>12</sup> only and not in short-form spot advertising.
- 3.15 Rule 15.5.2 has been amended to remove the previously proposed requirement for services promoting permitted psychic services to be positioned in a particular section of an EPG. However, services wishing to promote permitted psychic practices, either on entire channels or in teleshopping windows, should ensure that labelling information on-screen and in the EPG should make clear the nature of the content i.e. featuring psychic practices for entertainment purposes only. This information should also be made clear in the use of the product itself, at the outset of the service.
- 3.16 Advertising for permitted services under 15.5.1 and 15.5.2 is also subject to the restrictions of the content of the advert that are set out in additional rule 15.5.3.
- 3.17 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.
- 3.18 Following introduction, the arrangements will be monitored for the products featured and the way in which they are advertised. Stakeholders should be aware that Ofcom

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<sup>12</sup> Advertising for a product or service is defined by Ofcom as long-form if it involves an entire programme, block of programmes or entire channel.

will, if necessary, reconsider the manner in which, and the channels on which, these PRS products are promoted.

## **Regulatory arrangement for PTV services**

3.19 Ofcom, BCAP and the Advertising Standards Authority (which applies the BCAP Advertising Code in its consideration of complaints and investigations about TV ads) have discussed the most appropriate regulatory body for PTV services which may now be regulated as teleshopping (or long-form advertising) under the Advertising Code. Ofcom and BCAP/ASA have agreed that, for the time being, Ofcom will be the regulatory body for Participation TV.

3.20 PTV services are defined as long-form advertising content that:

- has as its primary purpose the promotion of premium rate telephony services (PRS);
- or has as its primary purpose the promotion of paid interaction by viewers with content, through payment mechanisms other than PRS.

3.21 This involves the following genres of content currently regulated under the Broadcasting Code by Ofcom:

- adult chat
- adult sex chat
- psychic
- quiz.

3.22 For consistency, it also includes the following genres currently regulated by ASA:

- gambling
- dating
- message boards.

3.23 TV services meeting this definition will be regulated by Ofcom under the Advertising Code. The ASA will in the first instance pass any complaints relating to PTV to Ofcom. Regulatory monitoring or activity related to the relevant rules will be carried out by Ofcom.

3.24 Both organisations consider that the arrangement plays most fully to the particular strengths and expertise of the two organisations, which will be drawn on where required, and that it will provide clarity and effective regulation to industry, customers and viewers.

## **Next steps**

3.25 The revised Advertising Code is due to come into effect on 1 September 2010. The amended rules will be effective from this date.

- 3.26 The changes to the Broadcasting Code rules on promotion of PRS in editorial programmes confirmed in the consultation will also come into effect on this date. Thereafter PTV channels unable to comply with the Broadcasting Code rules will be regulated as Teleshopping under the Advertising Code.
- 3.27 No action will be required for many PTV channels. However, they must ensure that from 1 September 2010 they comply with the Advertising Code.
- 3.28 The revised Advertising Code rules will require TV channels wishing to promote telecommunications based sexual entertainment services (including PRS) or live psychic PRS to ensure that they are licensed for the purpose of the promotion of such services. These licences are currently categorised as 'editorial' in the annex to the licence, and will need to be amended to be 'teleshopping' licences. Broadcasters would therefore need to request an amendment to annex to their licence to reflect these requirements should they wish to broadcast such content. This should be in advance of the date that the rules come into effect on 1 September 2010.