

Response to Participation TV, Rules on the promotion of premium rate services.

## Background

We are concerned that dedicated Participation TV (PTV) channels, which have operated for a number of years attracting few if any viewer complaints are in danger because of the principal that viewers must be able to determine what is editorial and what is advertising. We believe that this principle is outdated and serves no purpose in the modern landscape of convergent technologies

We take the view that any change in the regulations must be examined in light of a full and far-reaching impact assessment for industry and consumer alike. We feel that OFCOM have not considered the impact on freedom of choice for viewers, the jobs of those working in the industry and the freedom of speech and expression of the program makers. It is evident to us that OFCOM have entered into a long-winded and costly consultation process for which there is no clear need. With this in mind we simply ask the question WHY?

OFCOM's own research has indicated that there is no evidence of consumer harm from Adult and Psychic services. Indeed OFCOM's own research has indicated strong public demand for the content. There is no obligation under UK or European law for OFCOM to act in this way. We are concerned that the PTV debate is simply a convenient and round about way of banning, curtailing and censoring content that is simply disliked by elements within OFCOM.

In our response we intend to question OFCOM's decision to reclassify certain TV content as advertising. OFCOM's hope in our submission is that because of the genre of TV they are effecting, namely Adult and Psychic services, no one outside the industry will want to public appear to support these services and that the industry involved in their provision will simply have little or no option but to except OFCOM's decisions.

The UK regulatory framework has to take into account directives from the European Parliament and in this case the Audiovisual Media Services Directive (AVMSD) which came into force in UK law in December 2009.

Article 1 of the AVMSD sets out some important definitions that must be considered when trying to determine what a TV broadcast is or isn't. They are:

(a) "audiovisual media service" means:

- a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this Article or an on-demand audiovisual media service as defined in point (g) of this Article, and/or

- audiovisual commercial communication,

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

e) "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

l) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

What is unclear from these definitions is at what point does the use of a paid entry method for interaction by viewers with an editorial program (what ever that is) make it an advert and therefore make it subjected to advertising rules.

For example is X factor editorial until they start promoting the Premium Rate Numbers to vote for contestants but then becomes an advert? Does the viewer need to be told they are watching an advert at that point? Isn't any commercial transaction, be it a Premium Rate number entry to talk to a show presenter or the purchase of a product that is physically sent out already adequately governed by other legislation like the Distance Selling Directive and the Unfair Commercial Practices Act. In the case of Premium Rate Numbers there is certainly an extensive code of practice already in place which is enforced by PhonePayPlus under a co regulatory model with OFCOM. So surely there is no need for further regulation?

That said does it matter that Adult and Psychic PTV services become classified as advertising. The simple answer would be no, as long as they are not disadvantaged by doing so and consumers are not adversely effected.

Currently broadcast advertising is dealt with by the BCAP code and under this code both Adult and Psychic PTV services would be subject to a ban if they wanted to operate in their current formats. There is no justified reason to change the formats as there is little or no legitimate consumer complaints, there is no evidence of wide spread harm and offence and minors are not being put at undue risk by the services. Therefore it should follow that the regulation needs to change to allow the formats to continue and on this point we are in agreement with OFCOM's view that revisions are made to the BCAP code.

However as BCAP has publicly stated during the consulting period that it has no skill set or desire to regulate Adult and Psychic broadcast services we would suggest to OFCOM that a new Self Regulation or Co Regulation model is the most appropriate way forward for these genres of TV and options that should have been considered during this consultation.

There is already a group that represents 100% of Psychic and over 80% of Adult PTV broadcasters that could be engaged by OFCOM to take on the role. This group is called the Participation TV Broadcasters Association. A dedicated Association would have the knowledge and desire to effectively regulate this area and with the European Parliament already mandating that Self Regulatory or Co Regulatory models should be promoted it would seem like an idea opportunity for OFCOM to engage with the industry to facilitate this.

To further endorse our view that OFCOM must make sure by reclassify Adult and Psychic services as Advertising that they are not adversely effected we refer the reader to Article 10 of the AVMSD which says:

1. Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

We would suggest that the second sentence is crucial to dedicated PTV formats in so far as it states that new forms of advertising (which we would argue PTV shows would be) should not be prejudiced by the need to keep advertising and teleshopping separate from Editorial content.

We interpret this to mean that once classified as advertising we should be able to broadcast on any channels that are willing to accept us. OFCOM's preference for option 4, which would restrict Adult PTV to those channels in an adult EPG and in terms of Psychic PTV to those channels in a specialist interest EPG would therefore appear to be prejudicial and at odds with Article 10.

In section 3.15 of the Consultation document OFCOM states that despite conceding that the boundaries between editorial and commercial content are blurring and that consumers of particular services (presumably Adult and Psychic) may be content with this OFCOM feels the need to protect the public at large. What do they need protecting from? OFCOMS research of users of these services shows that there is no consumer harm so if actual users are not being harmed how can non users and the public in general be harmed?

Before moving on now to answer the specific consultation questions we would like to comment on the proposed rewording of section 10.9 and 10.10 of the current Broadcast Code that covers Premium Rate Numbers and is dealt with in section 4 of the consultation document.

We feel there is no need to change the current Broadcast code rule for Premium Rate Numbers. The proposed amended 10.9 is not required at all in our opinion. Such an addition could have an adverse effect on development of broadcast content and may constitute a restrictive trade practice in terms of the ban on other payment mechanisms, namely credit card services.

We would however suggest that OFCOM takes this opportunity to reword section 10.10 to more appropriately deal with Section 120 of the Communications Act which sets out that there should be an approved code under which Premium Rate Numbers are operated. A suggested wording would therefore be:

***10.10 Any use of a premium rate service must comply with a Code of Practice as approved by OFCOM under section 120 of the Communications Act.***

With reference to the proposed wording changes to the BCAP code we suggest that section 11.1.2 is worded as follows:

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

***1)Advertising for telecommunications based sexual entertainment services is only acceptable on dedicated channels that are licenced for the purpose of promotion of these services after 9.30pm and before 5.30am. Where the transmission platform permits such channels should be appropriately positioned and labeled within an Adult or similar section of an Electronic Programme Guide.***

***2) Advertising for telecommunications based sexual entertainment services is only acceptable on non dedicated channels that are licenced for the purpose of promotion of these services after 11pm and before 5.30am in long form advertising consisting of a minimum of 15 minutes. Any such adverts must include an introduction warning that the advert is of a sexual nature to allow consumers the opportunity of not watching.***

With regards to Psychic Services the BCAP code should be simplified to cover the following areas:

- 1) *Psychic service may be broadcast at any time of the day and are not restricted to any particular channels with the exception of dedicated children's channels.*
- 2) *Services must not :*
  - a. *Make claims for efficacy or accuracy*
  - b. *Predict negative experiences or specific events*
  - c. *Offer life changing advice directed at individuals –including advice related to health (including pregnancy) or financial situation*
  - d. *Appeal to children*
- 3) *Advertising Long form advertising consisting of a minimum of 15 minutes*

Other than the above we don't think there needs to be any further sections in the BCAP code related to Psychic services. References made specifically to restrict the occult should be removed. We note that the broadcast code allows for such services under certain conditions.

In response to the specific consultation questions we provide the following answers:

#### **Consultation Questions**

##### **Question 1:**

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

##### **Answer 1**

We agree although in the case of Psychic we don't think OFCOM has understood and given enough weight to the importance of allow such broadcasts to appear on channels outside of the specialist area of an EPG.

##### **Question 2:**

- Do you agree with our analysis of the options available for regulation of the promotion of premium rate services of a sexual nature, and*
- a) *that on the basis of options, a change to the existing rules appears merited?*
- b) *of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?*
- c) *that the scheduling restrictions of 9pm to 5.30am and requirements for labelling and EPG position under option 4 offer appropriate protection for viewers?*

##### **Answer 2**

If adult PTV services are to be classed as Teleshopping then we agree that changes to the existing rules are merited. Although we think that OFCOM

should now look at the possibility of Self Regulation or Co Regulation by a body such as the PTVBA.

We think that option 2 would have the least impact on Adult PTV.

For both option 2 and Option 4 we would like to see a move to a 10pm start for Adult PTV programming. This provides enhanced protect against children being able to come across the content. We do not think it appropriate to restrict the provision of the content to particular platform providers based on the availability of EPG services. This would exclude and disadvantage Freeview viewers. There should be no requirement for encryption on either option.

**Question 3:**

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

***a) on the basis of the options, that a change to the existing rules appears merited?***

***b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?***

***c) that the restriction of promotion to specific live personal psychic services and the requirements for labelling and EPG position provide appropriate protection for viewers?***

**Answer 3**

As with Adult services we agree that if Psychic services are to be reclassified as Teleshopping then changes to the BCAP code are essential and appropriate. However again we raise our concerns that BCAP has previously stated that it has no desire or skill set to deal with these types of broadcast and therefore we suggest that OFCOM must look at Self Regulation or Co Regulation by a more appropriate body such as the PTVBA.

Again our preferred option is option 2 but we do not except that there a risk of harm and offence as these programmes have been broadcast for many years now in general entertainment areas and we can find no examples of harm or offence occurring.

We do not think that there needs to be any restriction on where psychic services can be promoted and we would go further to suggest that restricting Psychic services to only the dedicated channels in specialist areas of EPG's would result in a major decline of the business.

**Question 4:**

***a) Do you agree with the principles identified for changes to the Advertising Code rules on promotion of PRS of a sexual nature (rule 11.1.2) and psychic practices (rule 15.5)?***

***b) Do you agree with the wording of the proposed rules? If not, please suggest alternative wording.***

Answer 4

We do not think that there is any need to retain the restriction section 1-i) relating to Encrypted elements of Adult channels but would like to see the broadcast times restricted to 9.30pm to 5.30 am.

Taking into account Article 10 as detailed above we do not believe that it is appropriate for OFCOM or BCAP to restrict what may be advertised in relation to Adult and Psychic services save as to say that they must not be illegal or misleading.

There should be no restriction on the payment methods allowable as to do so could disadvantage the public at large and there is no evidence to suggest that such a move is needed or desired by the public.

We also feel that 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. This is an important issue and OFCOM must urgently start discussing this with industry.

## Conclusion

Our final conclusion is that OFCOM has not engaged with the providers of Adult and Psychic PTV in any meaningful way. It is our own view that the personal preferences of those within OFCOM is effecting OFCOM's interpretation of the code and is adversely effecting both consumers and industry. There has been a lack of consistent application of the Broadcast code with reference to Adult PTV which has lead to a skeptical view of OFCOM's motivation in the area of PTV in general.

In order to regulate this area effectively OFCOM must now fully and openly engage with Adult and Psychic PTV providers in a more practical way. Industry has been trying to do this with OFCOM for years but with little effect. The Consultation process over the last three years has not taken enough account of the views put forward by industry. OFCOM has in our view paid only 'lip service' to the industry with the consultation processes and just continued with it's own pre determined agenda.

One positive outcome from OFCOM's actions has been that industry has actually now come together itself. Associations have been formed and new codes of practice are being worked on. The ground work is being done to allow for Self or Co Regulation by people who understand the market and the issue that it faces, people who are best placed to protect the industry while maintaining independence in terms of code enforcement.

We now urge OFCOM to 'come to the table' to work with industry and we support the objective of the Participation TV Broadcasters Association to become the lead organization in the regulatory environment for PTV, working in association with groups such as the Premium Rate Association, AIME, PPP and BCAP to facilitate and come up with some effective regulation.