IN THE MATTER OF OFCOM'S PARTICIPATION TV PART 2 CONSULTATION

OPINION

Introduction

1. I am asked to advise a number of clients (referred to collectively in this Opinion as "the companies") in relation to issues arising out of Ofcom's consultation paper entitled *Participation TV Part 2: keeping advertising separate from editorial* (9 April 2008) ("the April Paper").

2. The companies produce participation television programmes including programmes featuring psychic services, adult chat services and, to a lesser extent, quiz TV programmes. These programmes each involve invitations being issued on screen to viewers to call or send text messages to displayed premium rate telephone numbers. Those viewers who participate in this way can obtain either a tarot reading (in the case of psychic channels), may converse with a presenter (in the case of adult chat channels), or can take part in a competition (in the case of quiz TV). These channels operate on a different business model when compared to traditional commercial broadcasters who rely upon "spot" advertising income. Unlike traditional channels, they rely upon the income collected via the operation of the premium rate services as an essential source of funding. These channels operate on the Sky TV platform but without encryption and are thus "free to air" in that sense. The regulation of premium rate services including their content from a consumer harm perspective is undertaken by Phonepayplus, formerly known as ICSTIS.

3. If Ofcom implements the decisions which it has set out in the April Paper the companies face the end of their businesses in operating these channels or burdens in continued operation which I am instructed will render

continuation very difficult. In short, the effect of the decisions will be that psychic services will simply have to end, that adult chat will only be permissible on encrypted channels, and that quiz tv in its current form will be subject to severe minutage restrictions. What is most surprising when one considers the Ofcom processes which have culminated in these decisions with serious and potentially fatal consequences for the companies is that there has been no consideration by way of impact assessment or otherwise of: (a) whether there was any need for encryption or cessation given the existing content of the channels and whether the BCAP Code (which will now apply to the channels) should be amended; (b) the financial implications of the decisions for the companies and matters such as the feasibility of encryption; or (c) the needs and wishes of consumers who will now lose the ability to watch channels or have to pay to receive encrypted channels.

The Process

4. How can this state of affairs have come about? How can Ofcom have arrived at so radical a set of decisions without undertaking an impact assessment concerning these issues, a course which it routinely and regularly undertakes in fulfilling its regulatory role in other respects? These channels have been operating for several years without encryption but what is the exact *reason* for now encrypting them or banning them altogether? I emphasise the word "reason" because one looks in vain through the April Paper to find a reason other than the assertion that these are *consequences* of the channels being reclassified as advertising rather than editorial and therefore they are now subject to the BCAP code. That is not a reason which explains why, as a matter of content or other proper regulatory reason, these channels should now be banned or encrypted.

5. Ofcom has simply given no consideration at all to the correctness on the *merits* of the end result (banning or encryption) but has concluded that this result simply follows from the reclassification. One might understand

this end result if Ofcom had decided that the content itself caused some form of public harm and that it had the duty to protect against this harm with banning or encryption being the only solution. But that was not the task which Ofcom set itself when it embarked upon this consultation process. This process was aimed at keeping editorial content separate from advertising content; it was not concerned with the distinct issue of whether the content itself (however it was classified) was such that the public needed protection from that content.

6. One can break up the Ofcom process of reasoning set out above into the following steps:

(i) Having arrived at the view in the 2007 Consultation that Option 2 was the preferred regulatory option (an option which was also favoured by stakeholders and which did not involve banning or encryption) Ofcom was diverted from this course by a view taken as to the relevance of the ECJ's judgment on 18 October 2007 in Case C-195/06 *Kommunikatioinsbehrde Austria v Osterreichischer Rundfunk* ("the ECJ Judgment");

(ii) Ofcom's view was that taking into account the indicia identified in the ECJ Judgment the channels were properly classified as advertising rather than editorial in content and Council Directive 89/552 requires the separation of advertising and teleshopping from other content (Article 10);

(iii) On reclassification of the channels as advertising content they fall to be regulated by the BCAP Code and not the Broadcasting Code;

(iv) In consequence and applying the BCAP Code (specifically §10.3 and §11.1.2) psychic channels are banned, adult chat channels can only continue on an encrypted basis and quiz TV content can only operate with strict time limits.

7. Ofcom's error is exposed when one considers the *leap* from reclassification (step ii) to the banning or encryption (step iv). It is not lawful for Ofcom to say that because it has reclassified the content as advertising the channels must simply live with the consequences of the fact that they are now subject to the BCAP Code which means banning or encryption. Ofcom has to be able *itself* to justify that ultimate result. It is not sufficient to say the result follows because of the reclassification. That is an abdication of regulatory responsibility and is in my view unlawful.

8. It is important to stress that there is nothing in the ECJ Judgment or indeed in the Directive which *required* Ofcom to arrive at this result of banning or encryption. The ECJ did nothing more than suggest some factors for application by the domestic court in assessing whether a specific quiz show was advertising or teleshopping. The underlying proceedings before the domestic court which referred the questions to the ECJ were concerned with whether the programme was to be classified as advertising or teleshopping because of the restrictions in domestic law (reflecting the Directive) on the amount of broadcasting time that could be devoted to advertising in schedules by ORF. In the Directive the importance of distinguishing between advertising/teleshopping and editorial content is to ensure viewers are not misled (see §§25-27 of the Judgment). Neither the Directive nor the Judgment are concerned with how domestic regulators in the Member States will decide *how* to regulate content which has been determined to be advertising/teleshopping and editorial other than saying that there must be clear separation for the consumer protection purpose. The need for separation does not logically require banning or encryption yet under Ofcom's approach

it appears to consider that this result necessarily flows the ECJ Judgment. It does not.

9. While it was no doubt important for Ofcom to consider the ECJ Judgment in deciding how to classify the channels, I find it surprising that the ECJ Judgment is cited in the April Paper as the reason for departing from Option 2 and deciding to take up Option 4 with the result that the BCAP Code applies. Even if the content of the channels is now to be regarded as advertising (which is a matter for a case by case analysis in any event) it was incumbent upon Ofcom not to impose the result of banning or encryption on the channels without a full investigation of whether that result was necessitated by some facts. But there are no facts identified. I should stress again that it is not satisfactory for Ofcom to say that because the BCAP Code leads to a banning or requires encryption that is a reason. It is not a reason.

10. In summary, I do not understand how Ofcom can have arrived at the present situation when Ofcom had concluded (subject to the ECJ Judgment: see §2.29 of the April Paper) that Option 2 was appropriate on the merits and that there was under that Option no need to ban or encrypt. I can readily see how the ECJ Judgment can have persuaded Ofcom to review the regulatory framework for participation television and the issue of the correct classification of the content in the light of the ECJ's observations. I do not however see why the channels should be proposed to be banned or encrypted as a result of anything said in the judgment. The judgment compels no such result and the decision to suggest banning or encryption was a decision made by Ofcom itself without any proper process of investigation. If Ofcom is still determined to go down this road of banning or encryption it needs to undertake this exercise using the processes mandated by Parliament; specifically, a full impact assessment under section 7 of the Communications Act 2003. It cannot lawfully ban or encrypt the channels through the "back door" by simply reclassifying them as advertising and leaving the companies

to their fate at the hands of BCAP and its Code. Parliament expects major regulatory decisions to be arrived at following a full impact assessment. It is not lawful for Ofcom to side step that obligation by making a decision on reclassification and then saying that the consequences of that decision (even if they include cessation of business) are a matter for its delegated regulator BCAP and its Code. Ofcom has itself to investigate the full implications of the consequences and not to seek to disown them. If necessary, it has to work with BCAP to assess *which* provisions of the Code or new provisions should apply to the companies[1]. It cannot present the companies with a *fait accompli*. These are issues for specific consultation with the industry as part and parcel of the process accompanying the impact assessment.

The Human Rights Act 1998

11. I have a further concern about the issues which arise in a human rights context. It is uncontroversial that the companies are exercising an existing right to freedom of expression in a commercial context when they operate their channels[2]. This is protected speech within Article 10(1) of the European Convention on Human Rights. For many years that free speech right has been exercised by the companies and exercise of the right has been subject to detailed regulation for the purposes of ensuring on a content basis there is no public harm. During the present consultation Ofcom has expressly excluded consideration of any issues concerning the content of the channels from a

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1 The Code (which dates from 2002 and essentially replicates the 2002 ITC Advertising Standards Code) has clearly not kept up with the modern business models of PTV channels. Ofcom retains ultimate responsibility for the Code made under s.319 of the Act and has the ability to require changes: see Ofcom's own helpful summary of the division of responsibility at para 10(b), page 6 of the Memorandum of Understanding of May 2004. One cannot sensibly simply subject the companies to the BCAP Code provisions when those provisions were never formulated with the present business models in mind and, if applied, mean those legitimate models cannot be continued. I note that in BCAP's response to Ofcom's Issues Paper on 31 January 2007 BCAP expressly suggested that Ofcom should not consider the issue of amending that Code to address the adult chat and psychic TV. If and insofar as Ofcom has accepted that submission it should not have done do so without a full regulatory impact assessment of the merits of subjecting the channels to a new regulatory regime (the BCAP Code) which was never formulated or hitherto applied with the companies' business models in mind.

2 See *Lester & Pannick, Human Rights Law and Practice* (2nd Edition) at para. 4.10.16, page 352, and para. 4.10.22, page 357. Even though the State enjoys a wide margin of appreciation in regulating such speech, including in its broadcast aspects, the speech is nevertheless protected and interference requires justification.

public protection perspective - the subject of the consultation is keeping advertising content separate from editorial content and not the nature of the content itself from a public harm perspective. Yet, the end result of the process is that the channels are to be banned or encrypted as a condition of continued operation. Those are serious infringements of free speech rights which had hitherto been exercised. This is not regulation of a new form of expression. There is existing speech which is to be banned or heavily circumscribed in its exercise.

12. But there is no rational justification offered for that result. It has not been said that the content is *now* regarded as so harmful that it should be banned or subject to encryption and that there is an Article 10(2) justification for the interference - that cannot be said because Ofcom has expressly left such matters out of account. So why is it that Ofcom proposes now to interfere with the companies' free speech rights. There is no new matter which justifies curtailing these rights. I repeat that an assertion that the channels now fall within the BCAP Code is not a good reason.

13. I mention this point because I consider that Ofcom's decisions which have the ultimate result of placing the channels into a system of regulation in which they cease to operate violates section 6 of the Human Rights Act 1998. That section makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The companies are presently enjoying a Convention right of freedom of expression. That expression is going to be terminated or heavily curtailed as a result of Ofcom's proposed decisions. I cannot however identify in Ofcom's decision-making process any fact which justifies that termination or curtailment. Specifically, Ofcom has not said that some new element of public harm has been identified. All that has happened is that there has been a "paper" reclassification exercise where the content is now described as advertising. Even assuming this new description to be

correct (but without accepting this is correct in fact[1]) how does that mere reclassification justify banning or encryption as a condition of continuation? It does not.

14. Ofcom cannot point to any legitimate aim which would justify this interference for the purposes of Article 10(2) of the Convention. Saying that there had been a mistake for many years when the channels were not subject to the BCAP Code because they were considered editorial exposes the lack of any justification for now cutting them off. It exposes the fact that there was and is no real need for the restrictions in the BCAP Code. Was there some unchecked harm flowing from the content of the channels in the many years until now? Clearly not - had there been, Ofcom would have exercised its powers under the Broadcasting Code to (inter alia) revoke broadcasters' licences. Ofcom was also and still appears to be satisfied that its co-regulators including PhonePayPlus are capable of ensuring the content is properly policed. What has changed? Nothing as far as I can identify in the papers other than a "desk top" reclassification exercise.

Conclusion

15. The companies have a legitimate and modern business model. Even if their content is now to be classified as advertising and not editorial, I do not see how it is justifiable to ban their content completely or to make distribution of the content subject to onerous encryption requirements. Nothing in Community law requires such a result. Specifically, nothing in the ECJ's Judgment requires this result. If Ofcom wishes to investigate this industry with a view to banning or encryption it must undertake a proper impact assessment[3], and also have some compelling reasons based on new evidence

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[1] As the ECJ Judgment makes clear one has to focus on the specific content of each channel before making an assessment.

[3] See section 7 of the Communications Act 2003 and Ofcom's statements of best practice in policy making.

to justify restricting the free speech rights which have thus far been exercised by the companies.

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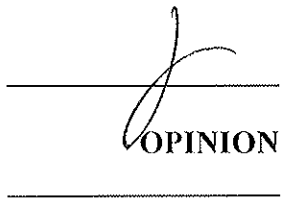

OPINION

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