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Participation TV Part 2: Keeping Advertising Separate from Editorial. Response to consultation by Com and Tel (UK) Ltd for use on consultation website only

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Background

Com and Tel UK Ltd are a reputable UK Service Provider, licensed under live licence permission certificate 9908017 by Phone Pay Plus. We have been established since 1998 and obtained the first of only three available live licences that were available to UK service Providers at this time. Our current business is primarily functioning as a Service Provider for several Participation Television Channels. This accounts for 85% of our current business.

Whilst we are a relatively small Company in terms of full time members of staff (four), there are many Companies and individuals that rely heavily on the revenues that are generated on the premium rate numbers that we supply to the Broadcasters. This is not limited to the Broadcasters themselves, as currently our Premium Rate services, which comply fully with the Phone Pay Plus code of Practice, have a resource and support network of third party suppliers which include hosting companies, live operator suppliers, live operator trainers, technical support agents, and corresponding administration and management staff, involved on an employed or self employed basis. We estimate that there are over one thousand individual people relying on the revenues generated from the numbers we provide to PTV programmes.

We have been the Service Provider for Psychic Interactive TV since its beginnings, as well as being the Service Provider for the "Babe" style PTV channels Babecast, Sex Station, Blue Kiss TV and several Daytime Chat Channels. We therefore cover many different PTV genres and take a responsible view on each, working between the Broadcaster and Phone

Pay Plus to achieve a quality product that we believe gives value for money to the consumer.

It should be noted that both Psychic Interactive TV and Babecast TV have been on Sky for over four years now. We have regular liaison with Phone Pay Plus to ensure we follow their latest guidelines and directives and run a very successful business.

Babecast was one of the first PTV shows of its genre to go to air. At the time of starting there was only one other soft adult channel and now there are 15, which indicates the growth of the industry and of viewer demand in a relatively short time frame. Psychic Interactive TV remains the only major PTV show offering psychic entertainment of this nature. We are pleased to say that in all the time we have been operating we have received NO COMPLAINTS from Phone Pay Plus concerning the promotion of our premium rate numbers on either show, nor our management of the end service for the consumer. We are therefore somewhat confused at the OFCOM consultation, which effectively brings an end to five years of successful and compliant PTV service provision, with tens of thousands of happy customers. In our opinion, OFCOM are trying to regulate 5 years too late! If there was a problem in this genre of TV we do not understand why it was not raised beforehand, particularly in the light of the lack of complaints?

We note that you state *"(2.1) Viewers and listeners enjoy taking part in programmes and having an opportunity to win a competition, influence the outcome of a programme or otherwise contribute to the programme. Increasingly, audience participation involves premium rate telephony services."* This is precisely what we provide to our respondents and why we and others in this industry have experienced regular and considerable growth in terms of both response and popularity.

It should also be noted that we have;

- a) An application pending since autumn 2007 with Phone Pay Plus to increase our PTV capability. We are unable to move forward with this due to your consultations.
- b) Investment of IVR capacity, building of new programmes and extra line installation on hold since September of last year.
- c) Two new PTV clients, which we are unable to proceed with under these new guidelines. Both are very different to any current PTV programming and are compliant in terms of Phone Pay Plus regulation. We have already made significant investment for these and have had to put these projects on hold. Neither client has adult or psychic content, but they are PRS based shows.
- d) One new employee to take on. We are unable to do this as it looks as if our entire business will fold before the end of this year, due to this consultation.

We therefore have to strongly disagree completely with your statement *"(3.52) Ofcom does not believe that innovation would have been affected by any of the four options offered in the 2007 Consultation, or by the new proposals in this consultation."*

Our business life has been virtually on hold since the results of your first consultation and we are completely tied in terms of progression and innovation. Our Company's outlook is also entirely grim. We fully understand the ECJ judgement, but do not see that OFCOM needs to broadly apply this judgement in the UK marketplace so that channels are effectively forced off air. This is not a requirement of the ECJ judgement or the European Television without Frontiers Directive.

Question 1: Do you have any comments on the drafting of the proposed amendments to the Broadcasting Code set out in Section 4? Please provide drafting suggestions where appropriate.

We do not agree with OFCOM's comments about the relevance of the ECJ judgement to adult and psychic PTV. Com and Tel works closely with a number of networks, service providers and customers across Europe including Germany, France, Greece and Spain. We have specifically questioned our contacts following the announcement of OFCOM PTV2 to verify the effects (or lack of them) of the ECJ judgement, the current status of PTV programming in other European countries and how they are likely to be affected. There were no reported changes in regulation since the publication of the ECJ judgement. Some of our associates and customers are very directly involved with PTV products and/or with Regulators in other countries and have seen no change.

As PTV exists in similar formats for both adult and psychic products in other countries, as well as other PTV products which also remain unaffected, it is hard to see how OFCOM have taken an isolated Austrian case and formulated a so called "European" decision which they then broadly apply to all PTV genres in the UK. The decision would therefore appear NOT to be a "European" one and would possibly be entirely questionable at a European level, bearing in mind the status of PTV in many countries outside of Austria. We would question how extensively OFCOM had looked at the true European position of PTV in other countries, information which was not included in their pre-consultation or in the PTV2 report. This surely bears great relevance to OFCOM's "European" decision, before its blanket application to the UK market.

Whilst the consultation states in 4.12 that *"The proposed rules make absolutely clear the need to ensure direct contribution to editorial content"* OFCOM does not accept the viewer's view (and indeed our own view) that the current show formats contain editorial content, which is created via interaction between the viewer and the presenters on this type of show.

OFCOM seem to be missing a major point in terms of fulfilment of services on Quiz TV compared to Babe and Psychic genres. *"The principles of the case are broad enough to apply to other Genres of dedicated PTV besides quiz TV insofar as they raise the same or similar consumer protection issues. If it is possible for a quiz show to represent "a real offer of services", then it follows that other genres of PTV may - depending on the particular facts - also represent a "real offer of services"* This is not at all the case. Quiz TV is far more like a lottery in terms of fulfilment. The viewer knows he only has a chance of winning when he dials. On Babe and Psychic PTV all calls are fulfilled, all viewers can participate and interact. We therefore comment accordingly on the proposed amendments to the Broadcasting code;

10.6 - Editorial content has not been defined specifically by OFCOM, therefore we believe it remains open to interpretation. It would appear however, that for Babe and Psychic PTV, OFCOM do **not** accept the current show formats as containing any editorial content. We assume that this is due to the frequent promotion of the premium rate number and the viewers' direct interaction with the show being portrayed on screen, which OFCOM deems is direct response to "advertising" rather than being part of the editorial of the show, which is contrary to what the viewers believe.

OFCOM must realise however, that many of the reasons for the current format of Psychic and Adult PTV are unequivocally due to regulations or stipulations by Phone Pay Plus which

have been introduced at various times, particularly in the last couple of years, for PTV. Some of these have greatly contributed to creating an atmosphere of a teleshopping rather than an editorial environment. Examples of these would be that pricing must be given verbally at least every 10 minutes by presenters, that the service must be explained regularly by presenters and so on, as well as being clearly marked on screen at all times.

The factor of whether a show actually contains entertaining content surely rests with the viewer. During the entire PTV2 consultation, there is little reference to the consumer research which OFCOM itself conducted last year (An independent report on Participation TV - quizzes, adult, chat and psychic readings. Viewer research summary Prepared by Essential July 2007) which surely should play a large part in its final considerations, being direct input from the consumers on behalf of which it has duty to act. The research does suggest that viewers do believe that the shows are editorially led and are therefore editorially justified;

Some comments were

1.4.5 The qualitative research suggested that regular viewers of Psychic TV, particularly female viewers felt the content could be very engaging

1.4.6 Respondents who watched 'Babe' TV had pragmatic views about the programming and expressed very few concerns about content or practices. There was strong support for "soft" adult content on television.

We therefore believe that OFCOM are creating problems concerning the separation principle, when it is generally accepted that current content is of an editorial nature.

10.7 - We agree that the broadcaster should retain responsibility for all PROGRAMME related material. However we as the Service Provider also have a responsibility to FURNISH the broadcaster with the information he needs to remain compliant on the premium rate products, as stipulated by Phone Pay Plus. This should include advising the Broadcaster on permissible phone content and promotional material and keeping some evidence that this has been clearly presented. It is often the Service Provider that has Regulatory knowledge of the Premium Rate regulations over and above the Broadcaster. Furthermore the end service should be the responsibility of the Service Provider, over which the Broadcaster has little control. This is a complex situation as under Phone Pay Plus' regulation of premium rate services, the Broadcaster is defined as the Information Provider. For adult and psychic PTV, the IVR may be under the control of the Service Provider, while the Broadcaster may supply TV presenters who are logged onto the IVR, therefore creating a complex situation for Phone Pay Plus in the allocation of responsibility.

10.8 - Generally speaking Com and Tel have no problem with the principle of sponsorship, providing that any sponsorship or activity of a commercial nature is made clear to the audience, either by way of an audible announcement or by means of a clear on screen message.

10.9 - Here we absolutely disagree, despite providing no alternative billing mechanisms outside of premium rate ourselves. The consumer has a right to pay for product in any way he pleases, as long as he has access to all the clearly labelled information he requires to make a purchase. A credit card user must be over 18, so this requirement is also satisfied.

10.10 -We find the wording of this section somewhat confusing but it depends of course on your definition of editorial. We do however feel that the inclusion of off screen operators, particularly in the case of Psychic TV, is a valid and desirable feature for the caller, offering greater choice and value for money that still has relevance to the programme

Live PTV is limited in how many presenters or on screen operators it can have at any one time. In many cases, Psychics who are on TV one day can still participate in the shows as off screen operators when they are not on the show. There is a high demand from consumers for their favourite psychic in this respect. If off screen operators are disallowed, the consumer is left with the choice of connecting only to any one of the on screen psychics, or listening in if they are busy. This reduces consumer choice and importantly, under PPP regulations under our live licence, it is a stipulation that we offer every caller a 121 call who wants one. This can only be achieved by offering an alternative off screen 121 operator in the PTV formats. These operators are stringently trained according to existing regulations. If OFCOM disallow off screen operators, we would effectively be in breach of our own live licensing agreement with PPP!

It is important to understand that at the dawn of these shows, Service Providers held existing live licences for 121 applications. The eavesdrop element was added for PTV under permission from PPP and NOT the other way round. The programmes today are still based on the original licensing agreements, with a priority for consumer choice in the availability of operators.

10.11 -

- *the service is directly derived from the particular programme;* we agree but also strongly feel that all our services are “directly derived” from the programme, and feel that OFCOM should acknowledge this.
- *the service enables viewers or listeners to participate directly in or contribute directly to the editorial content of the programme;* we agree, subject to our comments as stated in 10.10 that we believe that off screen operators are a valid part of the programme, and subject to OFCOM recognising that the content created via participation is in fact editorial in nature.
- *the service is not given undue prominence within the programme;* we strongly disagree. Viewers do not have any problem with the current format. Why change something if there is no problem in the viewers’ perception? Again to quote the audience research on “Babe” style programmes, the programmes were generally considered transparent in nature regarding what the participating viewer could expect.
- *the programme consists primarily of content other than the promotion and use of the service;* We agree, strictly on the basis that OFCOM recognise the content as being generated by the viewers themselves in the interaction with the programme. We strongly disagree if this is not the case.
- *the primary purpose of the programme is editorial, and any commercial activity associated with the service (including but not limited to the generation of call revenues) is secondary to that purpose.* We strongly disagree. We believe that in the current formats, the programmes ARE editorially based, as perceived by the viewers in your audience research. We do not believe that the generation of call revenues should need to

be secondary to the purpose of entertainment, as that is the nature of Call TV. We feel this statement shows that OFCOM does not wish to see any programming on TV other than those provided on mainstream terrestrial channels, which can be supported by advertising or sponsorship and which generate vast amounts of revenue and are arguably much more commercial in nature than the channels for which we provide numbering. This is a backward step for innovation and amounts to censorship of smaller channels which provide alternative and viable entertainment to the public.

10.12 - We absolutely support the principle and wording.

Question 2: Do you have any comments on the draft explanatory guidance set out in Section 4? Please provide drafting suggestions where appropriate.

We believe that the guidance appears more concerned with the outlawing of certain channels/content than truly ensuring separation, or achieving the correct classification of content. In short, the guidance prematurely and unfairly distinguishes between certain types of programmes when this should be considered on a case by case basis, in line with the ECJ judgement.

- *The PRS promoted within the programme clearly provides viewers with a genuine opportunity to participate in, contribute to or otherwise influence editorial content, e.g. entry to a competition, voting, on-air display of text messages, on-air discussion in a magazine-format show.*

We agree with the main body of the statement that " *The PRS promoted within the programme clearly provides viewers with a genuine opportunity to participate in, contribute to or otherwise influence editorial content*", but disagree with the deliberately limited examples that OFCOM have given thereafter. OFCOM have omitted viewer interaction that does not include on air discussion, which is relevant to Babe and Psychic TV in its examples.

We do not feel that on-air discussion is essential for viewers to participate in these types of show. We should further reiterate our view that we feel that off screen interaction can be part of the show as long as this is clearly explained by the programme presenters.

- *References within the programme to the PRS are occasional only.* This is an overly vague statement that needs clear definition and we do not agree with either its wording or its principle. Com and Tel support an industry accepted restriction on the length of time premium rate numbers should be displayed, as long as this introduced fairly and on a level playing field across the industry. We do not agree with the wording "Reference within the program to PRS is occasional only". This is also contrary to the current advice from Phone Pay Plus regarding pricing, as it is difficult to mention pricing without also mentioning the service (i.e. promotion of premium rate number) that the pricing is related to.

- *The degree to which PRS is referred to within the programme is clearly justified by the degree to which the PRS contributes to editorial content.* We agree, strictly on the basis that OFCOM recognises that on Babe and Psychic PTV the current content should be classified as editorial.

- *PRS is clearly only one element of the broadcast content, e.g. as is often the case in a studio-based game show, a magazine-format show, a sports discussion show, or a reality show.* Again you have omitted a Babe style show or a Psychic show in your definitions of broadcast content. We note that the shows you mention here as being

acceptable, are in fact those that have high levels of consumer complaints (e.g. Reality Show, Big Brother, GMTV, Blue Peter). It is not the small channels such as Babe and Psychic PTV that are creating complaints; it is the well known terrestrial brands causing real consumer harm. It seems outrageous that the regulator does not step in when large brands are involved, despite evidence of the potential and real consumer harm. Yet is happy to take smaller, problem-free channels off air in an apparently carefree manner, despite severe job losses and there being no evidence of consumer harm.

Going back to your original consultation, may we remind you how this all began?

"PTV Part 1: Protecting viewers and consumers across all types of television content that encourages viewers to take part ('Participation TV' or 'PTV'). This was of particular significance in view of the number of serious compliance and editorial failures in PTV (particularly regarding PRS voting and viewer competitions) that came to light in 2007, most notably in mainstream programming broadcast by the public service broadcasters."

You now seem to accept that the public service broadcasters can continue in the same way that they have been, while effectively censoring the small channels and taking them off air. This is supported by your statement; *"1.12 The proposed rules would apply to all programmes which feature PRS. Many mainstream programmes, such as game shows with a viewer competition element and reality shows, feature PRS in a secondary manner that is likely to comply with the new rules."* OFCOM has essentially made a pre-determination about such programmes, without considering the amount of revenue they generate from the PRS element, and so on. This demonstrates a clear bias against the smaller channels which has nothing to do with the separation principle or the actual consumer harm caused.

4.17 Programmes that are clearly editorially driven, e.g. Big Brother, I'm A Celebrity Get Me Out Of Here, would be likely to comply with the proposed new Broadcasting Code rules above ('the proposed rules') and would therefore remain classified and regulated as editorial under the Broadcasting Code

This does not seem a sensible course of action and is completely outrageous given the fact that it is these programmes that cause high level consumer complaints.

- *On calling the PRS number promoted in the programme, viewers are not given advertising information or options other than participation in the programme.* Again we agree, subject to off screen options being included for greater consumer choice, providing these options are clearly detailed within the programme itself, otherwise we disagree.

- *PRS calls are charged at the lower end of the range of PRS charges permitted* We strongly disagree. This may not be practicable for smaller channels and it is entirely up to the viewer whether he decides to participate or not, at the rates offered.

- *The programme is not primarily or wholly funded by revenues generated by PRS. For clarity, in radio, this refers to the overall programming in which the item in question appears. We also recognise that on radio some shorter features may be primarily or wholly funded by PRS (or similar revenue-sharing telephony services).* We strongly disagree. This is what Call TV is! Premium Rate Services are either acceptable as a source of revenue generation or not. Again the statement itself is very vague and non specific and clearly aimed at excluding terrestrial channels and targeting smaller channels without

any case by case analysis. We are deeply concerned that the proposals are creating restriction on consumer choice.

Question 3: Do you agree that the proposed rules should apply to radio as well as to television?

Whilst we disagree with the proposed rules in the sense that they are currently defined, it makes sense for the same rules to be ultimately applied to radio as well as television.

Additional comments:

We believe that OFCOM are unnecessarily over-regulating and this is not in the interests of the consumer. This view was expressed in OFCOM's own consumer research;

1.4.10 There was, however, also a general sense that these dedicated PTV genres were robustly regulated, based on respondents' perception that all TV channels in general were felt to be subject to certain codes or regulations. However, most respondents expressed some concern if PTV were to be subjected to what they described as "nanny-state" intervention. Many felt that as adults they were responsible for their own actions and that tighter regulation was unnecessary.

From; an independent report on Participation TV - quizzes, adult, chat and psychic readings. Viewer research summary Prepared by Essential July 2007

The proposal is contrary to the view expressed in the conclusion of the Culture, Media and Sport Select Committee's 2007 report on Call TV Quiz Shows, that regulation 'should not be overly censorious in nature'.

This decision primarily affects small adult, psychic and quiz channels where there is little or no evidence of consumer harm and leaves the large PTV suppliers (where there are huge amounts of evidence of consumer harm) to carry on harming! The regulation is not in the interests of the consumers, the broadcasters, the Networks, the Service Providers, the hosting Companies, The suppliers of support services, nor indeed in the interests of innovation, consumer protection, Europeanisation or anything else.

These PTV shows are perceived as being editorial programming. OFCOM do not accept this. The public will not be additionally protected through this regulation. It was little surprise to anyone in the Premium rate industry when the larger shows on terrestrial TV created the consumer harm they did and this situation will not be altered nor bettered through the introduction of this regulation. The reclassification is relatively meaningless, except to the massive amount of broadcasting staff, service providers and support services that will be subject to redundancy through OFCOM's actions. Consumers already have the power of personal censorship through the remote control. Why not let them decide?

With regards to Psychic PTV you also state that (2.18) *In addition to questions of undue prominence and the promotion of products and services in programmes, this genre has the potential to raise concerns regarding vulnerable viewers. The Broadcasting Code seeks to address these concerns; amongst the relevant rules is Rule 2.8, which provides: "Demonstrations of exorcism, the occult, the paranormal, divination or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals."* Our operators

are specifically trained to NOT give life changing advice to individuals. We have our own additional and highly responsible Internal Psychic Code of Conduct based on both the PPP and the OFCOM requirements that exceeds all of these and gives specific guidelines to operators regarding the processing of psychic calls generated from PTV and other media. Neither OFCOM nor PPP have ever asked us to supply this, nor indeed seemingly thought to enquire what regulations we were applying. Should they have done so, they may have been pleasantly surprised and the concerns which have repeatedly been stated without substantiation in the Consultation documents have been quashed. We are happy to supply any information you require or participate in any discussions regarding regulation and the improvement of psychic marketing and service to the TV viewer.

Most of Britain would in all likelihood agree that there is a difference between "Dangerous Practices" and occult subject matter such as Satanism, black magic etc and the type of divination that can be found in every daily newspaper or women's magazine, which is far closer to the products offered on Psychic PTV. What we primarily object to is that no one has properly investigated or discussed any issues on Psychic Interactive TV, yet the consultation raises concerns which have not been addressed.

On Babe PTV, we apply similar principles, with a whole set of internal guidelines which constitute a "Code of Conduct" that has been in force since the commencement of call fulfilment for PTV, primarily for consumer protection. In addition there is an entire Operator training support hierarchy for both Adult and Psychic Operators, which OFCOM are probably unaware of. Following recent discussions with our associates, we also agree to look at a new Industry wide Code of Practice, applicable for PTV programmes.

Your proposed rules do NOT make it absolutely clear as to why *"such programmes must not in effect be vehicles for the promotion of PRS"* Clearly the lack of restriction on the internet creates the possibility for harder adult entertainment rather than the soft alternative proved popular to TV viewers. It would be ridiculous for OFCOM to create a situation where adult products are forced onto the internet, outside of current regulatory control.

You state in your consultation that

(1.2) The proposed rules will help ensure three important objectives:

- *that audiences and consumers are adequately protected.* For Babe and Psychic we feel they are. If you feel there are grounds for the concerns on vulnerability that you have repeatedly stated, we would be keen to address these. Surely this should have been done BEFORE OFCOM reached their conclusions? We do not feel this has been properly investigated.

- *that advertising is kept separate from programme content ('editorial')* We understand the separation principle, but this does not require the draconian measures proposed, nor the exclusion of the terrestrial shows which are highly commercial in nature.

- *that broadcasters do not circumvent advertising prohibitions by using programmes to promote services that cannot be advertised.* These programmes have been on TV for over four years. During this time, you have contacted the Broadcasters, discussed this and at no time mentioned that they must be removed from the air as long as they comply with your directives given at the time. Surely OFCOM's current way of thinking should have been addressed four years ago?

We feel that products offered via television offer no greater risk to the end user than those offered in magazines or newspapers. In this respect the products available on

Psychic and Babe PTV are no different and come under Phone Pay Plus regulations in the same way as psychic or adult lines that are popularly advertised in other media. These are generally low risk in terms of consumer harm. How does OFCOM justify a major change on TV, when none is necessary in other media?

We also note that in many other European countries both Adult and Psychic PTV products exist in similar formats and have not been affected by the ECJ judgement. The decision by OFCOM to try and apply the ECJ judgement therefore seems rather adverse in terms of making a "Europeanised" ruling.

The BERR website states "Life's too short to be bogged down by rules and regulations. And that's where the Better Regulation Executive comes in. We challenge new legislation and simplify, improve and even scrap existing regulation. The bottom line? We make a positive difference to you and your business."

Life is too short to be bogged down with rules and regulations, especially when they are unnecessary. We are all for good regulation, consumer protection, fair promotion and fair trading. We have been successfully managing our adult and psychic PTV business for many years. We do not consider *that "a positive difference to you and your business"* means it closing down altogether!

Please reconsider your consultation, consider the enormous count of job losses and create definitions that mean we can continue trading and entertaining the tens of thousands of happy viewers we have.

Yours sincerely

Taya Bose

Com and Tel (UK) Ltd