
Ofcom Consultation

Participation TV part 2

Keeping advertising separate from editorial

Ofcom undertook a Consultation in 2007 regarding its proposals for the separation of advertising from editorial. It stated its preferred option was for further rules to be added to the Ofcom Broadcasting Code to limit the extent to which PRS may be used in programmes.

Although Option 4: Classifying all dedicated PTV services as advertising, was detailed within the 2007 Consultation, Ofcom suggested its preferred route was to incorporate Option 2: Permissible as editorial, subject to meeting strict criteria intended to limit the degree of commercial activity, subject to Consultation responses and the anticipated judgement of the European Court of Justice in the Austrian communications authority v Austrian broadcaster case.

Moving forward to the present, we are now in a position where the 2007 Consultation has been superseded by Ofcom's interpretation of the ECJ judgement and what Ofcom perceives such judgement as necessitating. To call the current process a Consultation on Participation TV would be to overstate the fact that a decision has been arrived at which differs markedly from any of the options properly considered by the 2007 Consultation or those proposed by the majority of respondents to that Consultation. The future of dedicated PTV has been presented as a *fait accompli*, legitimised by the ECJ judgment.

Ofcom cites three important objectives as being served by classifying all dedicated PTV services as advertising:

- that audiences and consumers are adequately protected;
- that advertising is kept separate from programme content ('editorial'); and
- that broadcasters do not circumvent advertising prohibitions by using programmes to promote services that cannot be advertised.

Taking these three objectives in turn:

- ensuring that audiences and consumers are adequately protected.

The PhonepayPlus Code of Practice, approved by Ofcom, is designed to ensure that audiences and consumers can only use PRS with confidence. Its requirements mandate the presentation of clear pricing information in respect of PRS, service provider identity and contact details, whilst prohibiting the provision of services which could mislead

audiences and consumers. Sanctions for non-compliance with these audience protection measures are wide ranging and significant and include fines of £250,000 per breach of the PhonepayPlus Code of Practice.

Further robust protections exist in the form of revisions made in 2007 to Broadcast licenses issued by Ofcom and Broadcast PRS licenses required by PhonepayPlus from 2008 of the providers of the technology utilised by Broadcasters. These requirements augment the self-regulation undertaken by dedicated PTV Broadcasters to ensure the appropriateness of content for the time of day and by extension, audience.

- that advertising is kept separate from programme content ('editorial'); and

Article 10 of the European Television Without Frontiers Directive requires:

"television advertising and teleshopping shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/ or acoustic means"

No evidence of audience attitudes or research has been presented to support findings that dedicated PTV channels are not readily recognisable as advertising and providing interactive services. There is no ambiguity as to the operation of dedicated PTV channels, which Ofcom describe as channels predicated on the use of PRS.

The purpose of the separation principle is to ensure *recognition* amongst audiences of when they are watching editorial content and distinct from that, when they are watching advertising or teleshopping. It is argued by Ofcom that some dedicated PTV channels offer "no recognisable editorial". In the absence of editorial within a programme, the separation principle becomes academic as there is no editorial to keep separate. What then becomes material is how the content of the programme is defined and regulated in an evidence-based and proportionate manner.

- that broadcasters do not circumvent advertising prohibitions by using programmes to promote services that cannot be advertised.

This objective supposes dedicated PTV channels constitute advertising such that they are in breach of the BCAP Advertising Code and must therefore be removed from air or subject to encryption criteria they cannot meet. This purported circumvention is in fact a consequence of Ofcom's interpretation of the ECJ case in the current Ofcom regulatory framework, which Ofcom are at liberty and perhaps legal obligation to reconsider.

None of the three declared objectives provide compelling grounds for taking action which will cause many long-standing commercial enterprises significant detriment and others financial ruin. Contrarily, such action could reasonably be argued to contravene Ofcom's statutory obligations under the Office of Communications Act 2002 and the Communications Act 2003, both of which require a full assessment of the impact of any

action before market imposition. Further, Ofcom's Regulatory Principles require interventions which are evidence-based and proportionate. Such actions are not typified by measures which will have the effect of decimating an industry conservatively estimated as contributing sixty million pounds to the UK economy per annum and restricting scope for further investment and innovation in PTV.

In the event that the ECJ judgment has been properly construed, it is still unjustifiable that the outcome should be the banning or requirement of encryption of particular channels. Whilst the separation principle and its interpretation can be argued to be applicable, it does not require the severe outcome that Ofcom's proposed actions will have. Actions of such impact legally require a proper assessment to be carried out and until such time as this is carried out, proposals for reclassification cannot be made in a legal or informed manner. We would welcome the opportunity to work with Ofcom to assist in its undertaking of such assessment.