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Ofcom Consultation

Participation TV part 2

Keeping advertising separate from editorial

Formal Submission from Opera Interactive Technology Group

About OITG (www.oitg.com)

Opera Interactive Technology Group (OITG) is a leading global provider of interactive media, mobile and voice solutions. We are still among the fastest growing private companies in the UK and one of the largest licensed Network Operators for voice in the UK and Ireland (Times No.1 fastest growing private company in 2004).

OITG is one of few companies to not only be a Network Operator for Voice in the UK and Ireland, but also have direct connections into ALL major Mobile Operators in UK and Ireland for SMS/MMS/Voice Shortcodes.

Our partners and clients include many of the world's leading media brands. OITG has achieved a high-ranking Tech Track position as well as Media Momentum awards in both 2005 and 2006.

General

The unfortunate problems experienced during 2006-7 have been addressed by all Broadcasters and their technology and network support partners. Significant investment has seen compliance teams and improved management structures and processes put in place and supported by improved communications across the value chain. We are not aware of any significant consumer complaints or harm currently affecting this service sector and we can see the benefits of these initiatives as consumer confidence is returning to the Interactive Broadcast Services market.

OITG has independently and via its trade association AIME, played its part in this process and supported the release of the Industry Guide for interactive broadcast services with recommendations for best practice in the process of bringing services to customers. OITG continues to support an industry initiative to improve call charge transparency to interactive broadcast participants. Licensing arrangements for Broadcasters, supported by OITG & AIME, will be amended by Ofcom to place responsibility for consumer issues firmly where they belong, at the point of sale with the Broadcasters.

The measures triggered by the Ofcom intervention are clearly working and disproportionate change to the regulatory environment in this business sector would not appear necessary. We believe improvements in separating editorial content from advertising to avoid consumer confusion can readily be achieved without the introduction of potentially damaging and disproportionate regulatory intervention.

Executive Summary

Objectives

The summary declares three objectives to be achieved by proposed changes to Ofcom Broadcasting Code rules as follows:

- That audiences and consumers are adequately protected (assumedly from being confused as to the nature of programme content).
- That advertising is kept separate from programme content (editorial)
- That broadcasters do not circumvent advertising prohibitions by using programmes to promote services that cannot be advertised (prohibitions in the BCAP Code that will apply due to proposed changed regulation redefining certain existing services as advertising)

Additionally the Consultation states that programmes involving participation “must not in effect be vehicles for the promotion of PRS”. If introduced, such a constraint would have a serious negative impact on the future development of programming in this popular sector. If content was clearly labelled and consumers were properly informed OITG does not understand why the ubiquitous and popular PRS billing facility should not be utilised in such a fashion.

To briefly address the three objectives in turn:

- We believe the regulatory rules which already exist are adequate enough where the use of the PRS billing facility is involved and these, combined with the allocation of consumer interface responsibilities to broadcasters alongside a requirement for regular audit of broadcaster process, are more than sufficient to protect consumers. Anything more will be unnecessary, damaging and disproportionate; although we would support clearer labelling of programme content to emphasise the difference between advertising and editorial content.
- The desire to separate editorial from advertising originates from the European TWF Directive Article 10 viz;

“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”

We believe this can readily be achieved without forcing services to be inappropriately redefined as teleshopping with the serious and damaging commercial consequences that follow. It is also clear that the directive seeks to properly inform consumers, not separate consumers from the use of PRS as a micro billing facility.

It is the view of our trade association AIME which we fully support and endorse, that Ofcom reference to the ECJ “Judgement” in support of proposed rule changes is not relevant since it purely suggested some factors for application by the relevant domestic court in assessing whether a quiz show was teleshopping and which would need to be considered on a case by case basis.

The goal of the TWF Directive is clearly to eliminate consumer confusion and ensure that consumers are properly informed rather than to discriminate against a billing process. This is an objective which is fully supported by OITG but, as mentioned earlier, there are other less damaging ways to achieve this than forcing a range of services into an unsuitable Code (BCAP) that was never designed to accommodate them, and the owners of which have expressed reservations as to its suitability to receive them. There is the possibility that the BCAP Code could be reviewed and revised to accommodate this new genre of interactive programmes and better reflect the changing nature and attitudes of society. This would of course take some time and we would expect any proposed changes to be deferred until this exercise was completed.

- Forcing legitimate popular and established programming into regulatory pigeon holes (BCAP) where it “cannot” be advertised or operated is at best unnecessary and at worst censorship. There is also the consequence that such action will, for many services, effectively deny them the lawful right to continue trading and there may well be legal repercussions if Ofcom insists on this.

Assumedly, the issue of concern leading to the banning of certain advertising under the BCAP Code is to ensure inappropriate material is not readily accessible to minors. This is also an issue that greatly concerns the Interactive Entertainment industry and it already has a number of effective protective measures in place for interactive programmes.

While we believe interactive broadcast programmes should not be placed under the surveillance of the BCAP Code programme providers will be more than happy to constructively discuss with Ofcom how protective measures can be improved even further, if felt necessary. But the effective, and perhaps unintentional, banning of such programming, with the resultant significant losses to revenues and employment, is unacceptable and seriously disproportionate. We are also unaware of any evidence of significant consumer complaints or harm that would justify such action.

The Ofcom decision to effectively disregard the 2007 Consultation and opt for even stricter new rules than those originally proposed leans heavily on the supposed ECJ “Judgement” and in our view this is wrong in law.

Additionally we see no evidence that Ofcom have properly considered the impact of their changed stance and this is unfortunate since we believe the impact to be very significant and very damaging indeed, both to existing services and to future investment. It is important to understand that the impact extends to all types of PTV and not only dedicated PTV.

Proposed Rules

Ofcom summarises the proposed rule changes as follows:

- Broadcasters may only charge consumers via PRS to take part in programmes (NOT by credit card, direct debit, cash etc.)
- Where PRS is used in a programme for audience participation, it must not be given undue prominence within the programme
- The programme must consist primarily of content other than the promotion of the PRS
- The primary purpose of the programme must be editorial, and any commercial activity associated with the PRS (e.g. generation of call revenues) must be secondary to that purpose

Briefly addressing the objectives of these proposed rules in turn:

- **Charging**
Assumedly, the reasoning behind this rule is that if methods other than PRS are used for charging then a service would immediately be regarded as teleshopping under the proposed rules. The problems of accommodating it within the unsuitable BCAP Code then come into play. We regard this proposed constraint as seriously and unnecessarily damaging to the future development of interactive broadcast services since consumer freedom of choice of payment mechanism will certainly be an important and popular feature of future programmes.
- **PRS Prominence**
As can be seen from the TWF Directive the key objective is to remove possible consumer confusion and, as we believe there are other options to achieving this, it should not be a problem for PRS to be prominent if the consumer clearly understands the nature of the service offered. There is nothing inherently wrong with including the convenient PRS billing facility in programming so long as consumers are fully informed on the nature; content and cost of participation in the programme and the return of consumer confidence to interactive programmes clearly demonstrate popular demand for this payment option.
- **Promotion**
As with the previous comment, why should a programme not fully utilise PRS billing if the consumer is fully informed and in a position to exercise freedom of choice? Why would Ofcom seek to prohibit or, alternatively, not seek to facilitate an attractive programme format that has clearly demonstrated its popularity with

consumers and that has the potential to generate significant current and future commerce to the benefit of all?

Apparent attempts by Ofcom to regulate alternate financial models for interactive programming go beyond the intent of the TWF Directive in our view and will seriously inhibit future investment in the service genre.

- **Editorial**

It seems possible that the purpose and intent of the TWF Directive has perhaps been misinterpreted. OITG believes editorial programmes should certainly be recognisable as such and there should be no room for consumer confusion with advertising. This does not necessitate the effective banning of the popular PRS billing facility, rather it demonstrates the need for innovative ways to ensure consumers are properly educated and informed to recognise different programmes and there are options other than commercially damaging regulatory rules to achieve this.

The reasoning behind the statement that many mainstream shows are “likely” to comply with the new rules is far from convincing. The use of subjective terms and interpretations create confusion and uncertainty and will have the effect of discouraging serious longer term investment in this popular sector.

Background

The Consultation Background section consolidates the popularity of interactive or participation television and radio programmes and confirms our view that this is an important sector that offers significant commercial opportunities for the future. It is disturbing then that Ofcom are proposing the inflexible approach that these futuristic services have to be manipulated to fit inappropriate existing regulation, rather than take an enlightened view that the regulations should take this opportunity to adapt to a new and changing environment. It is even more disturbing when this policy will have significantly damaging effects on both current and future services including serious impact on revenues, employment and investment.

It is accepted and understood that the BCAP Code is designed to provide protection for consumers in a teleshopping environment but it was surely never envisaged that it would need to cater for current and future interactive broadcast services. The approved Ofcom PRS Code, as administered by PPP, offers comparable and adequate protection for consumers in an interactive broadcast services environment using the PRS payment facility.

Ofcom accepts that psychic and chat services are not new and that they operate happily in other media. Having successfully expanded into the broadcast space, where they have also operated happily without consumer complaint or harm for some considerable time, and offering consumers more choice problems will only arise if unsuitable regulations are applied as proposed in this Consultation.

It is not difficult, if considered necessary, to further improve consumer information in a way that clearly defines the nature and content of programmes but it can be achieved under the supervision of the current PRS Code. If consumer understanding and avoidance of confusion is Ofcom’s actual concern then, given

Ofcom's statutory commitment to pursue reduced regulation, we would prefer to follow this route.

Listed Key Genres

The existing and well established programme genres listed in the Consultation are lawful and successful and are provided in response to popular demand. They take seriously their obligations to ensure that access is adequately controlled with respect to minors and vulnerable members of society and a variety of protective measures are in place and operating successfully. As mentioned previously the Interactive Media and Entertainment industry is always prepared to consider improvements to this protection if perceived to be necessary although the Consultation makes no reference to evidence of consumer complaints or harm for these services.

- **Quiz TV**

Additional rules and guidance were introduced for Quiz TV during 2007 and the service has declined to the point where only one major broadcaster is engaging the market. A major reason for the removal of these popular programmes was the uncertainty introduced by the confused regulatory environment with several regulators vying for the same regulatory space.

- **Chat & Interactive TV**

Strictly speaking, these services are not, as suggested in the consultation, generally available as free to air transmissions as they normally sit behind subscription based digital channels provided via satellite or cable. Subscription based channels enjoy access to PIN control and do not broadcast until after the appropriate watershed. Participating viewers are also liable to Age Verification Procedures before being allowed to access content.

- **Psychic TV**

As with the previous programme genre the services provided are well established and lawful and are normally located behind satellite or cable subscription channels. In all these examples the use of PRS as a convenient payment mechanism ensures the application of the Ofcom approved, PPP applied, Code of Practice for PRS.

Comments and Responses

- **Option 1: No Change**

Ofcom questions whether the present situation is either satisfactory or sustainable, which seems to be a tacit admission that today's Broadcasting Code is inadequate for, and inhibiting to, current and future service developments in the interactive arena and the Code might therefore benefit from early review.

- **Option 2: Permissible as editorial, subject to meeting strict criteria intended to limit the degree of commercial activity.**

OITG supports AIME in questioning the validity of any regulatory change that is designed "to limit the degree of commercial activity" as it must be in the interests of UK inc. to develop and generate lawful commerce and resultant revenues, employment and taxes. If regulation has failed to keep pace with

technology and services development then regulation should be revisited before we accept anachronistic constraints on UK commerce.

It is certainly understood that a new service environment creates new regulatory challenge and it could also be that some services might need to adapt to a new but sensible and proportionate regulatory environment. This should not however cause established and successful services to cease trading due to disproportionate regulatory demands, and simple rules and detailed explanatory guidance should be the preferred route.

- **Option 3: Permissible as editorial, subject to clear labelling.**
This is the preferred Option for OITG and would surely satisfy the requirements of the TWF Directive with consumers having a clear understanding of the nature, content and cost of a service together with the freedom of informed choice. Ofcom discounted this Option largely because it was unlikely to be consistent with the ECJ “judgement” and, as mentioned earlier, we believe this view to be misguided.
- **Option 4: Classifying all dedicated PTV services as advertising**
Again this Option was dependant upon forcing existing, new and future programming into a regulatory BCAP pigeon hole that was never structured to receive it. If pursued, this route would be seriously damaging to the interactive broadcast genre. Ofcom discounted this Option in favour of Option 2 – again subject to the anticipated “judgement of the European Court of Justice” which, as stated previously, has not required Ofcom to implement the proposals being suggested in the Consultation.

New Broadcasting Code Rules

Having considered stakeholder responses and the “Judgement” of the ECJ Ofcom has opted to produce new rules to limit the use of the PRS billing option in broadcast programming considering “the factors identified by the ECJ as relevant”. We believe this assumption to be wrong for the reasons stated above. We also take the view that the TWF Directive, which is the basis of the ECJ Consideration, was never intended to address alternate payment mechanisms for consumers.

Apart from focussing on “controlling” the use of PRS billing Ofcom is suggesting separation of editorial content from advertising content by forcing the classification of many programmes employing the PRS micro billing mechanism as Teleshopping and placing them under the supervision of the ASA and BCAP Codes of Practice? It is generally well understood that these Codes were never envisaged or designed to apply to interactive broadcast services and the net result will be the elimination of established and popular services with serious negative revenue and employment implications for the industry. As demonstrably popular services their demise would also result in a significant reduction in consumer choice.

The Ofcom proposed rule changes should be judged according to the following criteria:

- Do they focus on ensuring consumers are fully informed to avoid confusion as required by the TWF Directive?
- Will they result in the removal of popular programmes and services thus depriving consumers of choice?
- Do they address the issues in a fair and proportionate way?
- Will they avoid unintended consequences?

Considering these criteria in turn:

- The focus of the Consultation appears to be on restricting consumers' access to programmes and constraining the use of the PRS billing model rather than improving consumer information and permitting and encouraging informed choice. This does not demonstrate the flexible, evidence based approach to regulation that we are entitled to expect.
- Under the proposed rules many programmes will cease to operate almost immediately and others may follow as restrictions make their presence felt or are better understood. Investment in new interactive broadcast programmes and services for the benefit of consumers in this popular sector will be seriously curtailed. We do not believe Ofcom fully appreciates the impact of the proposals on this industry sector and believes it is essential that a thorough, and new, Impact Assessment be conducted to properly consider the changes since Part 1 of the Consultation. It is our view that any assessment originally conducted under Part 1 of this two part Consultation will not include the significant and damaging effects across the entire value chain of the subsequent changes to Ofcom's proposals presented within Part 2, nor could it at that time identify any unintended consequences of those changes.
- We do not consider the proposed changes to be necessary, fair or proportionate particularly when we believe there are other more creative ways to address the requirements of the TWF Directive and without damaging our industry. We note the absence of any current evidence of significant consumer complaints or harm to support Ofcom's proposals with respect to those programme genres suggested to be re-positioned under the BCAP Code.
- We suggest that there are unintended consequences as we do not believe Ofcom would deliberately embark on a mission to eliminate £60-100m of annual revenues and more than 2000 jobs. As mentioned earlier there is a need for Ofcom to conduct a detailed assessment of the impact of their proposals.

OITG agrees with AIME on the necessity for clear distinction between Editorial and Advertising content but takes the view that there are other, more creative and effective ways to ensure that consumers are not confused or misled over the differences between editorial and advertising broadcast programmes or content and that they clearly understand when they are being sold to. These would also bring the benefit that they would actually enhance the interactive broadcast industry rather than seriously damage it.

Consultation Questions

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.

Answer 1

We take the view that any such drafting is premature until an accurate assessment of the impact of the Ofcom proposals has been conducted. We are also aware that there are alternatives to the suggested rules changes that could prove attractive when the true impact of the Ofcom proposals are understood and we would be pleased to address this at an appropriate time.

Question 2

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

Answer 2

As with Answer 1 we believe it is essential to await the results of a properly conducted Impact Assessment. However, for the record, we would like to confirm at an early stage that the guidance appears more concerned with outlawing certain channels/content than truly ensuring separation or achieving correct content classifications. 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.

Question 3

Do you agree that the proposed rules should apply to radio as well as to Television?

Answer 3

Radio and television are similar broadcast media and should attract similar regulatory controls.

Conclusions

OITG supports the view that consumers who are fully informed at the point of sale and able to exercise freedom of choice enjoy the most effective consumer protection available. This philosophy appears to be reflected in the TWF Directive, which purportedly forms the basis of the proposals made by Ofcom in this Consultation, in that it calls for removal of possible confusion for consumers regarding editorial and advertising content of interactive broadcast programmes. We agree with this objective and believe the best and most constructive approach is to pursue the goals of improved information to consumers and clear labelling of programme content. If this is considered difficult to achieve under current legislation or regulation then, given the absence of any evidence of consumer harm or complaints, any proposed changes should be deferred until the regulatory environment can be properly reviewed. We note and appreciate Ofcom's stated willingness to review the rules and, given the scale of potential damage to our industry from inappropriate change, we believe this review should be conducted sooner rather than later.

The Ofcom approach in this Consultation of applying existing and unsuitable rules to new service genres in order to meet the assumed requirements of the TWF Directive will cause serious damage to the interactive broadcast services sector, a sector which is extremely popular with consumers and which has invested heavily in addressing its core structural and management problems over the past year. Industry estimates of £60-100m of lost revenues and associated job losses in excess of 2000 for a number of popular and well established services are unacceptable, unnecessary and disproportionate to the issues being addressed. We believe it is essential that a new Impact Assessment be conducted to properly assess the consequences of Ofcom's rule changes since Part 1 of the Consultation across the entire interactive broadcast value chain.

There could also be legal repercussions from the effective denial of services of the right to continue to trade and we would wish to avoid such confrontation if at all possible in the best interests of all concerned.

Editorial and advertising content separation could very simply be accommodated by the creation of a new and properly labelled service category, used in other media, entitled Advertorial. With such a category consumers would be fully informed at all times of the nature of the service offering and would enjoy the freedom of choice over whether or not to participate. There would be no confusion regarding content and consumers would also enjoy the options of alternate methods of payment. Such an enlightened approach would trigger enthusiastic investment and create jobs, revenues and taxes to the benefit of all while satisfying the legitimate concerns addressed by the TWF Directive. As alluded to earlier, if current regulation finds it difficult to accommodate such a creative approach then it is the regulation that should be examined rather than UK inc. be disadvantaged.

OITG will work with its industry trade association AIME and would also like to work with Ofcom to achieve a more equitable solution to the accepted need to ensure consumers are not confused regarding the nature and content of interactive programming. Consumers do need to clearly understand when they are being exposed to a sale based proposition, what is being offered, what it will cost and what will be delivered, and the freedom to consider alternate payment methods is an important component in this process. As mentioned earlier, we suggest a new programme category of Advertorial would be an acceptable and beneficial route to follow which would avoid damaging lawful programming which exists today and offer clarity for future investment opportunities in this most popular of genres.

As Ofcom points out in a current Consultation on Self or Co – Regulation, in this time of challenge and convergence “legislative and regulatory flexibility is critical”.

Close

We look forward to your response and assure you that, as ever, our comments are made constructively and with the intent of achieving an effective, fair and

proportional regulatory regime for Premium Interactive Media and Entertainment services in the UK.

If any clarification to our response is required or if we can be of any further assistance please contact Shane Leahy, Group Chief Executive; email shane.leahy@oitg.com, Tel: +353 (0)87 6120000

Yours Sincerely,

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