



Consultation Response

Participation TV Part 2

About Triple Media

Triple Media Communications Ltd is a broadcast format and channel operations consultancy with a diverse range of clients in the UK, Europe and North America.

Relevant work to this consultation include regulatory and compliance assistance on the change to teleshopping status of a Gaming service – ahead of the full regulatory position (also the first to do so); Triple Media also provided audit and spot check compliance services to a number interactive broadcasters and producers across Europe.

These experiences educate our comments in this submission

Note this submission is made on our own behalf and does not necessarily reflect the views of our clients.

Response to consultation questions

Triple Media believe it is in the interests of both consumers and content providers that easily understood and consistently applied rules on separation are adopted.

All promotion of participation should be directly relevant to the program as broadcast, and be relevant to the mechanism used to participate: Phone calls should generate broadcast audio, SMS message should be shown on screen, voting should influence editorial outcome.

We agree that participation should only be sought where it is directly relevant to the editorial as broadcast, and welcome much of what is proposed.

However we have strong reservations in three areas:

- Proposed application to quiz TV contents.
- Economic test element of the guidelines.
- Interpretation of ECJ ruling on “a real offer of services” qualification.

Other key considerations relate only in part to this consultation. We believe it is a significant issue that the regulator is consulting about mass reclassification of content as teleshopping before completion of the RADA consultation work.

Better regulation requires that the compound effect of regulatory activity be assessed and controlled to avoid undesirable outcomes. We look for clarity on this issue.

Q1. 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.

Consumer protection is best served when clear unambiguous rules are in place.

We believe Ofcom is missing an opportunity by not applying a simple, consistent test to all broadcast game entry contests, both long form (Quiz TV) and short form (single quiz question, non real time multiple choice entries)

Legally the contests are the same and Ofcom should regulate as such.

Clear and Consistent Consumer Protection

Triple Media would prefer to see all editorial that is classified as a 'free prize draw' contest by the Gambling Commission regulated in a equal way: By the undue prominence test instead of what we consider as complex, inconsistent, unfair and ultimately unenforceable tests proposed in the guidance notes.

Proposed Rule wording addition, section 10.11 of the code:

Triple Media Proposed text for Broadcasting Code Rule 10.11

"Every promotion for a free prize draw contest should identify all entry methods with equal prominence in all visual or audio promotion messages"

We believe this simple statement offers greater consumer protection & consistency and achieves the same outcome as the PTV2 proposals; without the negative issues that we discuss later in this submission.

Consistent implementation of accepted practice across all regulators

Our 'all prize draw' proposal would also restore PRS entry as merely a 'pay for convenience' consumer choice - to take part in an editorial contest - rather than a raison d'etre.

Note should be taken of the Gambling Commission guidance in this area:

Gambling Commission - Guidance on Prize Competitions and Free Draws , Nov 2007:

2.1 "Parliament made clear provision for free prize draws which consist of a combination of paid for and free routes; "

Triple Media has sought legal guidance on how the combination of equal entry route prominence; the statutory free entry nature of UK Prize draw contest; and the impact these factors would have in the context of the ECJ "*real offer of services*" narrative.

The consensus is that a broadcast –even of extended duration -offered under those terms is likely to be considered no more a commercial service than the unregulated short form services that Ofcom is proposing to continue to permit.

A reasonable person could view it problematic that Ofcom is proposing to restrict the right of expression of a broadcaster to offer long form quiz content via dual paid and unpaid

entry yet does not address the issue of equal prominence of PRS route on short form quiz content. The proposed solution is inverse to the consumer harm caused – It's not long form Quiz TV that generated multi million pound fines for broadcasters, it is short form quiz and voting.

Teleshopping or Editorial?

According to submissions to PTV1; the Mediatique study; and the Culture Media & Sport Committee report: Quiz TV only has an average of 15% participation by viewers of each broadcast; Playing an average of 3 times in one day. Even before the Gaming Commission set clearer free entry requirements 20-30% of entries were via 'free' routes.

Our own experience supports this model.

Anecdotal evidence suggests the percentage of free players has increased on the primary PTV service on-air currently "Quizcall on Five" to IRO 40%. Equal prominence of all entry methods will likely tip that over 50% of players (who are still a small percentage of the total viewing audience)

The evidence points to Quiz TV now being a legitimate editorial genre, with legitimate editorial coverage (however extended) and mass non-commercial free participation. In this context the suggestion that Quiz TV is teleshopping is borderline ridiculous: Can I use an alternative entry to get a free 'ab-buster 2000' or 'George Foreman Grill'?

Triple Media suggest that undue prominence rules are appropriate levers of regulation in this sector and not the proposed economic & duration tests.

Q2. Do you have any comments on the draft explanatory guidance set out in Section4: Please provide drafting suggestions where appropriate?

Funding & Economic Test:

The proposed guidelines suggesting what may constitute breach of 10.11 contain a statement about the financial impact on Paid Participation activity:

Ofcom Draft Guidance on Rule 10.11 - Potential Breach:

"The programme is primarily or wholly funded by revenues generated by PRS, rather than by, for example, advertising revenues. For clarity, in radio, this refers to the overall programming in which the item in question appears."

Triple Media feel that this element of the guideline would breach the regulators duty under the Communications Act section 3(3) & 3(4)

Ofcom Duties under the Communications act 2003, Standard narrative:

"the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed"

Our concerns are:

- Risk of inconsistent application
- Guidance notes open to wide and arbitrary interpretation

- Disproportionately discriminates against smaller broadcasters.

Under the guidance, there is a **substantial risk that identical programming that may be compliant on a larger broadcaster is at risk of failing the same test on a smaller broadcaster**. This would be a clear failure and breach the regulators statutory duty to be consistent and accountable.

Triple Media believe that Ofcom is taking the economic elements from the ECJ judgement out of context.

Clouding the issues. Confusing the consumer:

The extent of the ambiguity of the guidance notes is concerning: It does not sit well with the principles of regulatory action – particularly the targeted and proportionate obligations - that the rules and guidance are so broadly drafted. This is 1980's style regulation of 'you're in breach if we choose to apply that rule in this way, this time' and not in keeping with modern, consistent, evidence led regulation.

It also puts broadcasters at a disproportionate risk of malicious complaints.

By awarding itself so many subjective tests Ofcom is inviting frequent complaints – with a considerable compliance burden – to be made against any broadcaster using PRS. This area of broadcasting attracts a handful of activists who have targeted and vilified staff involved (however peripheral) in participation TV. We note that Ofcom itself has requested that some individuals only contact it through legal channels and not direct to staff.

It is clear to us that any legitimate use of PRS, as stakeholders feel their way around appropriate use of paid participation, will be targeted. The burden will deter broadcasters and content providers.

Ofcom's suggestion that no single item should be taken in isolation does not excuse it from drafting rules and guidance that are clear, fair and consistent.

Q3. Do you agree that the proposed rules should apply to radio as well as to television?

Yes. We would suggest that the inclusion of Radio in any code is essential to ensure a consistent approach. It could be argued that the nature of radio makes clear price, volume and terms information less transparent to the consumer and risks greater harm

Conclusion

Triple Media believe that use of undue prominence rules coupled with the relationship of the participation/broadcast content rules are a better way to achieve the separation goal; and forefill the principles outlined in the ECJ judgement.

**Better regulation can be achieved with a simpler and more targeted approach:
Every goal; Every area set out in the draft of PTV2 can and should be achieved.**

The current draft falls some way below (in parts) what both the industry and consumers expect and deserve – possibly as a result of fitting initial ECJ assessments into an existing consultation discussion frame.

We urge the regulator to consider bringing all prize draw contests under a single clear framework, with the clear benefit to consumers and all stakeholders.

We urge that the initial reaction to the ECJ ruling be guided by real world situations and that you can see the case made that commercialisation issues are best governed by undue prominence levers and not rough and inconsistent financial and duration tests.

End.

Author:

Gary Cottier-Jansen
Triple Media Communications Ltd
gcj_mail@thetvstation.co.uk
08447 79 78 77
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