

Yvonne Matthews
5th Floor, Content and Standards
Ofcom
Riverside House
Southwark Bridge Road
London SE1 9AH

Ofcom Consultation

Participation TV part 2

Keeping advertising separate from editorial

******* Submission**

About us

The company is a telecommunications Network reseller and Service Provider specialising in the provision of interactive services within the Telemedia industry, we provide billing and technology solutions for Broadcasters and media groups.

We have been providing PRS services for almost six years and have been involved with PTV services for over 5 years providing both Mobile and fixed line solutions for our clients.

Please find below our answers to specific questions in the consultation and also comments on other specific points that we feel have an impact on the PTV sector and our business.

Objectives:

The summary states that the three objectives to be met by the proposed rule changes are that:-

- 1) *Audiences & Consumers are "adequately" protected.*
- 2) *Advertising is kept separate from programme content / editorial.*
- 3) *That broadcasters do not circumvent advertising to promote services that can not be advertised under the BCAP code.*

To answer each of the above in turn we make the following statements.

- 1) Consumers and viewers are already adequately protected by the current PPP regulations and the additional regulations imposed by OFCOM on broadcasters in early 2008 and also from the plethora of other consumer organisations that exist today. In respect of content broadcast on SKY consumers are also offered the ability to bar access to channels.
- 2) We feel that informing the viewer of what is, and what is not an advert can be done in much simpler ways, and we feel that pushing popular & legally running services in to a regulatory system that is not *currently* designed for it and by its own admission does not want the task of regulating it is only asking for more problems further down the line unless fundamental changes are made to the BCAP code.
- 3) Forcing services to take a route that will then deny them the right to trade could have possible legal implications if OFCOM insist on this course of action, if the issue is ensuring that certain content is not viewed by minors then this is already effectively controlled and monitored, the many companies involved with this sector of the PTV industry also work to a strict industry Code of Practice.

Proposed Rules:-

OFCOM'S proposed rule changes are as follows:-

- 1) *Broadcasters may only charge consumers via Premium Rate Services to take part in programmes (Not by CC, DD or cash)*
- 2) *Where PRS is used in a programme format for audience participation, it must not be given undue prominence within the programme.*
- 3) *The programme must not consist primarily of content other than the promotion of the PRS.*
- 4) *The primary purpose of the programme must be editorial and any commercial activity associated with the PRS (E.G. generation of revenue) must be secondary to that purpose.*

We address each of these points as follows.

Charging:-

- 1) We feel that dictating what billing mechanism can be used is unnecessary and damaging to the growth of this sector and feel that the consumer should be free to choose what billing mechanism they use. We were not aware that it was OFCOMS remit to prescribe what billing services can or can not be used within Participation TV formats or to be prescriptive on the tariff used, we feel this area is something that should be solely down to the discretion of individual broadcasters and or production companies whilst working in line with PPP regulations, if the consumer is fully informed of costs and is happy to pay 75ppm or more then we see no reason why this should not be allowed either by PRS or other micro billing services.

Prominence:-

- 2) Prominent PRS services should not cause an issue if the consumer is fully aware of the nature of the service and the total costs involved. We feel that prominence is a necessity to fully inform the viewer of the nature of the service and any associated cost to participate along with other information that may be legally required by other regulatory bodies. Many of the current services that can be found on SKY such as Psychic TV or many of the Adult services have clear and prominent promotion, this was instigated by PhonePay Plus to ensure that consumers were fully aware of costs and terms and conditions. We feel that prominent promotion and clear pricing along with service information is necessary to allow the viewer to make informed decisions on participation.

Promotion:-

- 3) We find it hard to understand why OFCOM wish to prohibit successful programme formats that have clearly and continually proved their popularity with the viewers and that provide significant commerce that is beneficial to all. Many of these services have little or no consumer complaints and those there are, are always dealt with effectively under current regulations.

Editorial:-

- 4) We agree that Editorial programmes should be identifiable, as should advertising and as should PTV type programme formats, but we feel that the effective abolishment of PRS within PTV formats should be superseded by ensuring that consumers are effectively educated / informed about what they are watching and or participating in, and there are many ways to achieve this other than through destructive and unnecessary regulatory changes.

New Broadcasting Code Rules:-

After considering the ECJ "Judgment" (*not a directive*) OFCOM has taken the decision to produce new rules that limit the use of PRS in broadcast programming. ***** strongly feels that this is the wrong decision and one made far too early, especially without any UK ruling in this area, and taking into account the very significant detrimental affect on our own businesses and to the Telemedia industry as a whole we are surprised at OFCOMS actions.

Ofcom seem to be concentrating on "controlling" the use of Premium Rate Services in broadcast programming and also suggesting separation of editorial content from advertising by forcing the re-classification of almost all PTV services as Teleshopping, thus placing them under the remit of ASA / BCAP. ***** is aware that the ASA & BCAP codes were never designed to apply to services of this nature, however we are sure it is possible that the BCAP Code could be reviewed and revised to accommodate this new genre of interactive TV and better reflect the changing nature and attitudes of today's society. Any changes would of course take some time and we would expect any proposed changes to be deferred until a full impact assessment has been carried out. The net result by the continuation of the current regulatory route will be the elimination of many successful and popular PTV services, coupled with this is the inevitable loss of jobs and loss of substantial revenues in this new and exciting industry sector. Square 1 feels that the continuation of this regulatory swing is not a flexible approach to regulation within a sector that is well established, already well regulated and also well respected globally.

As members of AMIE we also agree with the following :-

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. AIME does not believe Ofcom fully appreciates the impact of their

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 the AIME 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.

AIME agrees with 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:-

Ofcom 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.

Our Reply:-

We feel that any amendments to the code would be premature until a full and accurate assessment of the full impact of these proposals has been conducted. We feel there are real workable alternatives to OFCOMS current stance on the changes that have been suggested, and would hope that OFCOM fully investigates these before any changes are made.

It is clear from the following extract of a reply to the PTV consultation part 1 that other options need to be fully explored before a knee jerk decision is taken on this issue.

The following is from Lynsay Taffe, BCAP / ASA, Policy and Public Affairs Advisor reply to PTV Part 1 dated 31 January 2007.

2.1 Although we fully appreciate that Ofcom has a regulatory duty to assess whether the regulation of Participation TV is adequate, BCAP and ASA(B) are not convinced that regulatory concerns about Participation TV could or should be resolved simply by reclassifying such content as advertising.

2.2 It is clear from assessing the Ofcom Broadcasting Code [see sections 3.18 to 3.24 of this response document] that Ofcom's concerns could be resolved through the enforcement of that Code and adequate licensing decisions. However, it is also clear that Ofcom needs to resolve some questions related to interpretation and that that could be done via consultation.

2.3 Nonetheless, BCAP and ASA(B) consider that the scope of the consultation should not extend beyond Ofcom's direct responsibilities. The principle purpose of the consultation should be to inform Ofcom's enforcement of Section 10 of the Broadcasting Code and to inform future licensing decisions by attaining a clear view on whether this material is editorial content, commercial content, or requires a separate classification.

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

Our Reply:-

Please see answer to question 1, we would suggest that a full impact assessment be carried out in line with OFCOMS responsibilities, those being that "**an Impact Assessment should begin right at the start of a project, with the Impact Assessment being developed from then onwards**". Anything less we feel would be unacceptable.

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

Ofcom Question 3 . Do you agree that the proposed rules should apply to radio as well as to TV

Our Reply:-

We agree that radio and TV are similar media and should have similar regulatory restrictions but it is very obvious that radio differs to TV and this needs to be reflected in any changes going forward.

Our conclusion to PTV Part 2.

***** and its Directors have been involved in interactive PRS services for many years and have seen many regulatory changes some for the good and many that have been proven to hinder the industry.

We agree that changes need to be made but feel that the current stance / proposals by OFCOM are too harsh and damaging to a new and exciting industry. We have always found the best regulations and those that are embraced by both consumers and industry are founded on consumer education and understanding and that these then lead to effective consumer protection.

By continuing on this regulatory path we feel serious damage will be inflicted to both revenue and employment within the PTV sector both directly and also indirectly on the numerous other business involved in the value chain from call centre staff to equipment manufacturers and support services.

Current Industry estimates are in the region of between £60 to £100 million of lost revenues and with it in excess of 2000 job losses, we feel this is an unacceptable figure for any regulator to brush under the carpet and as we are sure you understand if these services are effectively prevented from trading this could lead to possible legal repercussions, something this industry wishes to avoid if possible.

We feel that one simple answer would be to create a new category for PTV services that is regulated by either OFCOM or BCAP, if the regulation is to be carried out by BCAP then we propose that rule changes should be made to the current BCAP regulations that allow the continuation of these services within a regulated environment and that this would only allow companies to broadcast within specific sections of broadcast platforms, for example those PTV services broadcasting within the current ADULT section on the SKY EPG would be allowed to continue to broadcast under an ADULT Teleshopping licence.

We feel that PPP and other industry organisations and the PTV industry sector could between them be successful in developing new workable regulation for these services to sit within a new category.

The above comments are made with constructive intention and we feel they would help in bring about an effective, fair and proportional regulatory infrastructure for the Participation TV sector in the UK.

We look forward to your reply.