

# EndemolShine UK

## Submission to Ofcom's consultation on new broadcasting rules Protecting Participants in TV and Radio Programmes

Endemol Shine UK (ESUK) is part of Endemol Shine Group, a global content creator, producer and distributor with 120 production labels across 22 markets and a portfolio extending across scripted and non-scripted genres, digital and gaming operations.

Labels within the UK Group include Artists Studio, Bandit Television, Douglas Road, DSP, Dragonfly, Electric Robin, Fifty Fathoms, House of Tomorrow, Initial, Kudos, Remarkable Television, Sidney Street, Sharp Jack, Shine TV, Shiny Button, Tiger Aspect, Wild Mercury, Workerbee and Zeppotron.

Those labels produce over 1000 hours of content a year in the UK, with a diverse range of hits including global entertainment formats, multi-award winning drama, genre defining factual and innovative digital content. A few examples include All Together Now (BBC1), Ambulance (BBC1), Black Mirror (Netflix), Bounty Hunters (Sky One), Deep Water (ITV), Hunted (Channel 4), MasterChef (BBC1), Peaky Blinders (BBC1), Pointless (BBC1), Surgeons: At The Edge of Life (BBC2), Treasure Island with Bear Grylls (Channel 4), Tin Star (Sky Atlantic), The Mash Report (BBC2), Would I Lie To You? (BBC1), Your Home Made Perfect (BBC 2), 8 Out of 10 Cats (E4) and many more.

Across that range of programming, ESUK and its labels take the welfare and wellbeing of their programme participants very seriously and have always aimed to put an appropriate level of safeguards in place, developed and refined with experience and over years of programme-making.

We have set out below our thoughts on the questions posed in the consultation and although we have dealt with each question sequentially there are clearly overlaps between them.

## Consultation Questions

### **Q1: Do you agree with our rationale for proposed new Rules 2.17 and 2.18?**

- 1.1 ESUK welcomes Ofcom's overall rationale to create a clear basis for the care of participants in programming and particularly the proposal for detailed guidance behind any new rules, to ensure that there is not a disproportionate or unjustified burden on broadcasters or producers which could hamper or obstruct programme-making. ESUK also believes, and acknowledges Ofcom's intention, that the new requirements should not result in a reduced likelihood of programmes featuring people with vulnerabilities and should be clear to encourage and not discourage further diversity in programming.
- 1.2 ESUK further agrees that the increased prominence of social media has completely changed the landscape for those taking part in programmes. Where before some participants may have had to deal with an element of traditional media scrutiny, they may now find themselves more likely to be exposed to individual and personal comment whether on their own social media accounts or more widely.
- 1.3 While that raises difficult questions of freedom of expression on the one hand, ESUK agrees with Ofcom that it is important that both programme makers and broadcasters should retain the freedom to make a range of programmes, including those which may ultimately have a greater potential to expose their participants to scrutiny, and participants should retain the freedom to take part in them. Although Ofcom has stated its desire that this should not be the case, there is a risk that regulation, if not properly balanced and proportionate, may result in a conservative approach being taken to participant selection where those with more complex needs or backgrounds become less likely to be selected for some programmes.
- 1.4 By way of example, there has been discussion in the context of this consultation around the potential stresses placed on participants in quiz/game shows, particularly where they stand to win significant prizes or sums of money. Or more precisely where they may fail to win those prizes or sums. This is not simply dependent on the level of the prizes available. The same level of prize may have a different significance to different participants. There is a danger that assessing the level of individual participant stress against what the prize on offer might mean to that participant could lead to those who would benefit most being deprived of the opportunity to take part in the first place.

### **Q2: Do you agree with the proposed meaning of 'participant' for the purpose of these rules?**

- 2.1 As above, ESUK does have concerns that the new regulations could in practice create an environment of more conservative participant selection, including for programming which, on the face of it, might be less expected to expose an individual participant to distress or anxiety. This may still be the case even with detailed

associated guidance from Ofcom, but underscores the need for that guidance to be flexible and allow for proportionate approaches.

- 2.2 As it stands, the test of “agreeing to take part” covers an extremely wide variety of participants. If the test is to remain this broad then it is even more important that the guidance is drafted in such a way as to make it clear that there is sufficient scope to deal with different types of programming in different ways.
- 2.3 ESUK agrees with Pact’s observation in its submission that the noted exclusions should be extended to cover paid professionals and other on-air staff, such as panellists, performers, comedians, musicians and dancers, not just presenters and reporters, as their interests are already protected by unions, agents or other representatives and/or separate employment-related legislation. ESUK also believes that the test should additionally be restricted to apply only to members of the public who agree to take part, which will help to reinforce the distinction from these exclusions. And the types of programming caught should exclude news, current affairs, audience phone-ins and programmes including questions from members of the public, live reporting and vox-pops. However, for clarity, ESUK does not share the view that production companies will, in all cases that involve members of the public participating, hold written agreements from those contributors. While this is always the preferred approach, there may be occasions, for example with vox-pops, where it is not practicable.

**Q3: Do you agree with the proposed scope of these rules?**

- 3.1 ESUK notes Ofcom’s observations in paragraph 1.9 of the consultation document that programmes focussing on conflict between participants or exposing a person’s vulnerabilities tend to be the programmes which generate significant viewer complaints and that the new rules are designed to work with existing Code provisions to address potential audience offence. ESUK believes that these observations reflect the fact that the types of shows mentioned also represent a high watermark in terms of the need for measures to protect their participants. By extension, other types of programmes will not necessarily reach that same watermark.
- 3.2 This is acknowledged by Ofcom in paragraph 3.5 of the consultation document and ESUK agrees with Ofcom’s analysis that different types of participation will raise different risks (and potential levels) of harm to participants. ESUK also welcomes the acknowledgement that the steps broadcasters and producers should take to ensure due participant care will vary considerably, depending on a number of factors such as the nature of the individual’s participation, the programme format and the degree of control over the participation which the broadcaster or producer has, as well as the individual person themselves.

- 3.3 As a result, and although ESUK recognises that Ofcom is a post-transmission regulator, the key factor in the new rules will be that the guidance Ofcom produces reflects that variety of potential risk/harm and of the consequent steps that broadcasters and producers will be expected to take.
- 3.4 ESUK therefore endorses Ofcom's assessment that the rules need to be flexible enough to work in different situations and take account of different types and levels of care that may be necessary. However, although that flexibility may be built into the use of the words "due" and "unjustified" in the proposed new rules, the accompanying guidance needs to elaborate on this important principle if the new rules are not to have a stifling or dampening effect on the inclusion of members of the public in programmes. For example, chat shows which involve light-hearted contributions from audience members should not be expected to adopt the same participant care measures for those contributors as programmes which focus on conflict between participants.

Please see further comment in the response to Q7 below.

**Q4: Do you agree with the proposed wording for the new Rules 2.17 and 2.18?**

- 4.1 ESUK agrees with the intent that the proposed wording of the new rules should provide for flexibility in the approach to varying programme types. ESUK also acknowledges that the test of justification is one already included in the Code in the context of Rule 2.3, requiring potential offence to the audience to be justified by context. There is however a concern that the term "unjustified" in the context of the new rule 2.18 becomes more of a consideration about the nature of programmes themselves, rather than about the treatment of participants in them, and therefore may have a potential stifling effect on the willingness of broadcasters and producers to pursue more challenging programming.
- 4.2 If the test becomes a judgement on the programming itself, there will be widely differing and subjective views on whether particular programmes, which may put participants in stressful situations, are "justified". Again, ESUK believes that the key to this and to preventing the new rules hampering or obstructing programme making is to ensure that the guidance allows for the participation in programmes which place their participants under higher levels of stress by willing participants who have given fully informed consent.

**Q5: Do you agree that Rule 1.28 should be amended in this way?**

**Q6: Do you agree that Rule 1.29 should be amended in this way?**

5.1/6.1 ESUK agrees that it is helpful for there to be consistency in the wording adopted across the two pairs of rules.

**Q7: Do you agree with the proposed approach to the Code guidance?**

7.1 As mentioned above, ESUK believes that the approach taken in the guidance is absolutely key to ensure that the right balance is struck in protecting participants and viewers, but not effectively outlawing certain types of programmes or excluding certain participants.

7.2 Equally key is that broadcasters and producers collaborate closely in agreeing an appropriate approach to participant care for each individual programme, that participant care matters are properly funded by commissioning broadcasters and that sufficient time is provided in the commissioning process for a proper analysis of the needs of each programme.

7.3 ESUK also welcomes Ofcom's acknowledgement that none of the steps outlined in the consultation will be specified as necessary or prescribed by the guidance. Rather, the guidance will allow for a flexible programme-specific approach, support broadcasters and programme makers in making individual judgements and will not simply default to what may be best practice for the type of programming which places participants in more extreme, stressful situations or under more intense scrutiny.

7.4 Although ESUK agrees with the broad, key guidance principles outlined in paragraph 4.5 of the consultation, there are some specific observations to make against the individual items:-

a) **Definition of a "participant"**

See comments under Q2 above

b) **Broad potential impacts on participants**

ESUK welcomes Ofcom's assurance that it is not the intention of the rules to hold broadcasters and producers responsible for outcomes beyond their reasonable control or which might involve complex causes. However the reference to "unforeseen" potential harm introduces a different and arguably higher test. Reference was made under Q1 above to the increased prominence of social media. In the current climate, where comment about a participant on social media by other members of the public is not merely foreseeable but increasingly likely, broadcasters and producers can take steps to try and prepare and inform participants, but cannot control those comments. Yet social media reaction seems to be at the heart of a large proportion of the difficulties participants experience and can be triggered by the most anodyne of circumstances. The rules should not be interpreted so as to hold broadcasters and producers automatically responsible for the responses of social media.

- c) **Due care**  
ESUK welcomes the confirmation that the word “due” is to be read, as elsewhere in the Code, to mean appropriate to the particular circumstances.
- d) **Appropriate in each case**  
As above, ESUK welcomes the confirmation that whether specific guidance recommendations are appropriate will vary depending on a combination of the nature of the programme, the nature and degree of participant involvement and the participant themselves. Broadcasters and producers should derive confidence from the guidance that they have flexibility in deciding the measures appropriate to individual programmes.

7.5 The same notions of flexibility, proportionality and appropriateness apply to the specific key steps listed under paragraph 4.7 of the consultation and again this should be clear where they are addressed in the guidance.

- a) **Before production**  
ESUK believes that some of these steps will apply to all programming – a risk assessment of the programme itself (as opposed to the individual participants) and record keeping of the approach decided upon will always be best practice. The programme risk assessment should nevertheless involve consideration of the potential impact on a programme’s participants or their families, scrutiny of their past and their current personal life and the potential for their life to be dramatically changed by taking part. Given the meaning ascribed to “participant”, some form of participant agreement to take part will also be a constant element, although the nature and detail of that agreement will vary dramatically by programme genre and between individual programmes.

Other steps listed will also vary.

The extent of background checks and whether they are conducted at all must be tailored to each programme and crucially must always be balanced against an individual’s privacy rights and the requirements of data protection law.

Decisions about engaging experts are not just about which type of expert is appropriate in the circumstances, but fundamentally whether it is right or necessary (based on the risk assessment) to appoint them. It will not be right for every show. Broadcasters and producers should also be mindful to avoid creating a conflict of interest in those experts being involved in deciding whether or not they should be engaged.

- b) **During production**  
ESUK agrees that participants should be given a contact point from the production in which they have taken part. However it may not always be a single individual, not least as production teams are often made up of large

numbers of freelance staff who will not always be attached to the production company throughout production and afterwards.

ESUK believes that consideration of editorial techniques should form part of the ongoing risk assessment process for a production and agrees that it is important to assess whether technical developments may create new participant care considerations.

ESUK welcomes the acknowledgement, inherent in the consideration of whether care provided should be altered during filming, that the approach to individual programmes needs to remain flexible and responsive, rather than prescriptive.

c) **Post-production**

While ESUK understands the rationale behind the proposed step to advise participants to minimise or limit their social media contact, the truth is probably that, whatever broadcasters and producers say, some individuals will not be able to resist checking social media reaction. Participants can be informed about potential social media reaction and given general advice to manage their own interaction with it, but the level of upfront support should be tailored to the nature of the programme. If a participant requests more specific advice at a later stage this can be provided then.

ESUK also understands the logic of informing participants about details such as transmission dates, but it should be recognised that broadcasters sometimes make last minute scheduling changes.

**Q8: Can you provide examples of best practice in the due care of programme participants which you think should be included in the guidance? Please share details if possible.**

8.1 ESUK is confident that its approaches to participant care developed over years of programme-making and across a variety of genres reflect best industry practice. It does however acknowledge that the range of support to be provided has been complicated by the additional challenges derived from the expansion of social media and the commentary on each other by members of the public, which is something that neither broadcasters/producers nor the participants themselves, however well-armed with advice they are, can control.

8.2 Against that context, “best practice” for participant care will vary by programme genre as well as by individual programme. The considerations, or what is considered best practice, for an immersive reality show with public voting will and should be different from best practice for a quiz programme. However ESUK does believe that there are some common elements to a best practice approach:-

- Maintaining an overarching participant care policy

- Close collaboration with the programme commissioning broadcaster
- A tailored participant care protocol for each programme, based on a risk assessment for the relevant production and looking at the production from start to finish, including consideration of the following:-
  - Casting/applications processes
  - Appropriate contributor checks/self-declaration, including whether assessments by appropriately qualified mental health professionals are appropriate, but always bearing in mind data protection requirements
  - Contracting/consent process, including explanation of the potential ramifications of taking part and an opportunity to consider any contract (or if for any reason that is not practicable the position to be assessed by the broadcaster and legal advisers)
  - Filming procedures/filming risk assessment, including consideration of elimination/removal processes if relevant (eg on reality shows with public voting) and provision of support from mental health or other professionals
  - Post-filming communication (particularly if participants have been subject to media attention)
  - Consideration of short and long-term aftercare, the level of planned contact, encouragement to contact the production team, availability of counselling or other support from mental health professionals or otherwise
  - Dealing with press, publicity, social media
- Considerations related to further programme exploitation

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