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BCAP's response to Ofcom's Consultation on PTV: rules on the promotion of premium-rate services

1. Introduction

- 1.1 This response is on behalf of the Broadcast Committee of Advertising Practice (BCAP). BCAP is the industry body with responsibility for writing and maintaining the Broadcast Advertising Codes, which are administered by the independent Advertising Standards Authority (ASA).
- 1.2 Further information about BCAP and the work that we do can be found at www.cap.org.uk/.
- 1.3 BCAP is not responding to the wider questions set out in Ofcom's consultation. BCAP is instead using this opportunity to submit to Ofcom two TV advertising rules that BCAP has recently consulted on and, following its evaluation of consultation responses, which BCAP now recommends to Ofcom.
- 1.4 These rules cover TV advertisements for telecommunications-based sexual entertainment services and TV advertisements for products and services coming within the recognised character of the occult or psychic practices.
- 1.5 BCAP is also submitting the relevant extracts of its 2009 general review of the TV and Radio Broadcast Advertising Codes and its evaluation of relevant responses to that consultation because it considers respondents to BCAP's general review of the Television and Radio Broadcast Advertising Codes have a reasonable expectation that their comments will be fully considered by Ofcom when it determines the final draft of these rules.

2. Background

- 2.1 Between 26 March 2009 and 19 June 2009, BCAP consulted on a general review of the Television and Radio Broadcast Advertising Codes ('the Code Review').

- 2.2. The Code Review included a detailed consideration of the present TV advertising rules for premium-rate sex chat services and, separately, products and services coming within the recognised character of the occult and psychic practices. The rules restrict the former to encrypted elements of adult entertainment TV channels and prohibit the latter with limited exceptions.
- 2.3 Subject to technical updates, BCAP proposed to maintain these rules and invited comments on its proposals. BCAP made clear that each rule was subject to change following its evaluation of consultation responses and a separate consultation by Ofcom, to which this submission now responds.
- 2.4 BCAP has now completed its evaluation of consultation responses. In summary, respondents who disagreed with BCAP's proposals did not, in BCAP's view, submit new evidence or raise comments that persuaded BCAP to change its proposed rules. Respondents who supported BCAP's proposals typically endorsed BCAP's assessment of each rule and, in some cases, introduced new evidence in support of BCAP's proposal. The Advertising Advisory Committee considered BCAP's evaluation of responses was fair and it endorses the rules that BCAP now recommends to Ofcom.
- 2.5 Ofcom is now consulting on a relaxation of the TV advertising rules for premium-rate sex chat services and, separately, products and services coming within the recognised character of the occult and psychic practices. Ofcom's preferred rules are more permissive than BCAP's rules, which BCAP now recommends to Ofcom in the light of evidence presented in the Code Review and BCAP's evaluation of consultation responses.

3. The composition of BCAP's response

- 3.1 Ofcom will approve the final BCAP Broadcast Advertising Code, including the advertising rules that are the subject of its PTV consultation. BCAP considers that respondents to its Code Review consultation have a reasonable expectation that their comments will be fully considered by Ofcom when it determines the final rules on TV advertisements for telecommunications-based sexual entertainment services and, separately, TV advertisements for products and services coming within the recognised character of the occult and psychic practices. Furthermore, BCAP expects that evidence presented in its Code Review and BCAP's evaluation of consultation responses will similarly be taken into account by Ofcom in finalizing the rules. BCAP's response therefore includes three attachments in addition to this covering response.
- **Annex 1:** TV ads for telecommunications-based sexual entertainment services. This includes the relevant extract from BCAP's Code Review and BCAP's full evaluation of relevant and significant consultation responses.
 - **Annex 2:** TV ads for products and services coming within the recognised character of the occult or psychic practices. This includes the relevant extract

from BCAP's Code Review and BCAP's full evaluation of relevant and significant consultation responses.

- **Annex 3:** Broadcast ads for or that include competitions. This includes the relevant extract from BCAP's Code Review and BCAP's full evaluation of relevant and significant consultation responses.

3.2 Note: In its Code Review, BCAP stated explicitly that its proposed new rule on broadcast advertisements for or that include competitions would be subject to change following BCAP's evaluation of consultation responses and a separate consultation by Ofcom, to which this submission now responds. BCAP considers it is appropriate therefore to include Annex 3 in its response albeit that Ofcom is not consulting on this rule or a version of it. Other than Annex 3, this response will not refer again to BCAP's new rule on broadcast advertisements for or that include competitions.

4. The rules that BCAP recommends to Ofcom

OCCULT OR PSYCHIC PRACTICES

15.4

Television and television text advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include astrology, personalised horoscopes, palmistry, fortune-telling, tarot, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

15.5 – Television and television text only

Television and television text advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a

the service includes no content that respondents might feel to be threatening and

15.5.1.b

both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

TELECOMMUNICATIONS-BASED SEXUAL ENTERTAINMENT SERVICES

Definition

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

23.2 – Television only

Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.

5. Factors that BCAP found persuasive in recommending these rules to Ofcom

- 5.1 The evidence and analysis presented in the BCAP Code Review and BCAP's evaluation of consultation responses provide a comprehensive understanding of the reasons why BCAP recommends to Ofcom the rules presented above. That information is included in Annex 1 and Annex 2 of this submission.
- 5.2 In its opinion, BCAP's review of the present rules places due emphasis on the Communications Act's requirements to ensure that persons aged under 18 are protected and advertisements that may be misleading, harmful or offensive are prevented.
- 5.3 In line with the Code Review's general policy objectives, BCAP aims to adequately protect children and others whose circumstances seem to BCAP to put them in need of special protection. BCAP considers this is important context to a review of categories of TV advertising that raise clear concerns about to the protection of children and the vulnerable.

TV advertisements for telecommunications-based sexual entertainment services

- 5.4 By restricting TV advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment channels only, BCAP considers its rule takes due account of the Communications Act's requirements to ensure that persons aged under 18 are protected and advertisements that may be misleading, harmful or offensive are prevented.

5.5 Factors drawn from the Code Review's consultation document and from BCAP's evaluation of consultation responses that BCAP found persuasive in finalising the rule it now recommends to Ofcom include:

- ✓ That long-form, live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Ofcom Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services.
- ✓ That research suggests nudity, sexual themes or bad language in TV spot advertisements are often a cause for complaint for the audience. Research shows that spot advertisements that show nudity or have sexual connotations are likely to cause offence.
- ✓ That one in ten children aged 8-15, and one in five children aged 12-15, have no rules in place regarding their viewing; most watch without an adult present and do not have any access controls set on their television.
- ✓ That 'channel flicking' continues to be the primary way of locating channels.
- ✓ That research indicates children can access sexual material and actively seek it out.
- ✓ That June 2009 Ofcom research, 'Attitudes towards Sexual Material on TV' (by Opinion Leader), stated:

"a wide range of factors such as context, editorial justification and mandatory access restrictions were extremely important when considering generally accepted standards." (p.69). "Most considered that stronger sexual material required stronger editorial justification and should be subject to a wider range of contextual conditions. Participants voiced the need for mandatory restrictions where appropriate, depending on the type and strength of sexual material." (p.69)

The conclusions made clear there was a "... **need for mandatory access restrictions for content perceived to be for the primary purpose of sexual arousal.**" In Ofcom's viewer research on PTV, prepared by Essential, page 6 states "**All respondents implied that the purpose of watching or calling 'Babe' channels was normally sexual gratification, although the channels were also seen as entertaining or amusing**". The research indicates that where TV broadcast material includes little or no editorial merit and the primary purpose of the broadcast material is sexual arousal, the case for mandatory access restrictions appears to be strongest. BCAP considers these findings support its proposal to maintain the present level of restriction on Babe Chat TV.

TV advertisements for products and services coming within the recognised character of the occult or psychic practices

- 5.6 By prohibiting TV advertisements for products and services coming within the recognised character of the occult or psychic practices, with limited exceptions to this prohibition, BCAP considers its rules take due account of the Communications Act's requirements to ensure that persons aged under 18 are protected and advertisements that may be misleading, harmful or offensive are prevented.
- 5.7 Factors drawn from the Code Review's consultation document and from BCAP's evaluation of consultation responses that BCAP found persuasive in finalising the rule it now recommends to Ofcom include:
- ✓ That research indicates these services can directly harm consumers by causing them to engage in lengthy and repeated consultations through premium-rate lines, incurring substantial call charges.
 - ✓ That research indicates these services have the potential to cause indirect harm by discouraging vulnerable individuals from seeking more suitable professional help, for example mental health counselling, financial planning or medical consultation.
 - ✓ BCAP considers that advertisements for psychic and occult products, particularly live, long-form broadcast formats, have the clear potential to mislead viewers: it is not aware of any evidence that supports the efficacy of psychic and occult techniques.
 - ✓ BCAP is concerned that the power of TV advertising inappropriately validates or otherwise lends a weight of credibility to a product or service that research indicates could cause harm to the vulnerable members of the audience.

6. The present public policy context

- 6.1 A BCAP Code Review objective is to adequately protect children and persons aged under 18.
- 6.2 This objective responds to enduring societal concerns about the welfare of children and specific, present-day reviews and reports about the impact of media and the commercial world on children in the UK, such as the 2008 'Byron Review' and the recently published 'Independent Assessment of the Impact of the Commercial World on Children's Wellbeing' ('Buckingham review').
- 6.3 Both of these studies looked at the possible impact of inappropriate or harmful commercial content in the media on children's wellbeing.

- 6.4 The Buckingham review in particular highlighted the ongoing concerns around this issue and the important roles of both Ofcom and the Advertising Regulatory System in ensuring people under 18 are protected from exposure to such content¹.
- 6.5 The rules that BCAP recommends to Ofcom should be considered in this context.

7. Conclusion and contact

- 7.1 This BCAP response is not intended to address the specific questions set out in the consultation document. However, BCAP is pleased to be able to share with Ofcom its detailed consideration, through the recent Advertising Code Review process, of the present TV advertising rules for premium-rate sex chat services, and products and services coming within the recognised character of the occult and psychic practices.
- 7.2 Following the Advertising Code Review process, BCAP proposes to maintain the current restrictions for the promotion of these services and the Advertising Advisory Committee has endorsed both BCAP's evaluation of consultation responses and the rules that have emerged from BCAP's consultation process.
- 7.3 The rules that BCAP recommends to Ofcom takes full account of the current public policy context and importantly it recognises the need to ensure that children and the vulnerable remain adequately protected from exposure to harmful or inappropriate broadcast advertising content.
- 7.4 BCAP is happy to discuss any aspect of this response. If there are any questions arising from this response, please contact me on 020 7492 2121, or at michaelt@asa.org.uk.

Yours sincerely,



Michael Todd
Policy and Public Affairs Officer

¹ Independent Assessment of the Impact of the Commercial World on Children's Wellbeing. Section 15 'Inappropriate content', paragraph 15.14.

Annex 1: TV ads for telecommunications-based sexual entertainment services.

Premium-Rate Services

Please read the proposed rules for this Code section before responding to the questions below. [To see the proposed rules, please click here.](#)

Background

The law

Communications Act 2003

22.1 The Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Premium-Rate Services section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

22.2 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Binding requirements

Ofcom television and radio broadcast licences

22.3 TV and radio broadcasters are required, by the terms of their Ofcom licence, to ensure advertisements they broadcast that promote premium-rate services (PRS) comply with the PhonepayPlus Code of Practice.

PhonepayPlus (PP+) Code of Practice

22.4 The PP+ Code of Practice sets standards for the promotion, content and overall operation of PRS, taking account of consumers, particularly children, who might be especially vulnerable. The Code is enforceable against those who provide networks that carry the services (network operators), those who provide the services themselves (service providers) and those who

provide the content of the services, if the service provider does not do that itself (information providers).

Other relevant regulatory bodies

PhonepayPlus (PP+)

- 22.5 PP+ regulates PRS under a co-regulatory agreement with Ofcom, which retains its legal powers in regard to PRS that stem from the Communications Act 2003. PP+ carries out its duties so that consumers, particularly children who might be especially vulnerable, can use PRS with absolute confidence. PP+'s Code of Practice sets standards for the promotion, content and overall operation of PRS. The Code of Practice is approved by Ofcom under section 121 of the Communications Act 2003. PP+ investigates complaints and has the power to fine companies, bar access to services and order refunds. PP+ can also bar the individual person behind a company from running a premium-rate service under any company name on any telephone network for a set period. PP+'s website, which includes its Code of Practice, is www.phonepayplus.org.uk.

Other

- 22.6 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements that promote PRS

- 22.7 Regulatory principles that are directly relevant to the advertising of PRS include the need to ensure transparency, especially about the cost, type and content of services and, because of the nature of some PRS, the need to protect the vulnerable, especially children. The BCAP Television and Radio Codes presently realise those principles through dedicated rules for advertisements that promote PRS. Those rules are intended to protect audiences from potentially misleading, offensive or harmful advertisements and, in line with broadcasters' Ofcom licence requirement, to secure compliance with PP+'s Code of Practice. BCAP proposes to maintain that approach in the proposed BCAP Code.

Television advertisements for PRS of a sexual nature

Ofcom consultation on Participation TV

- 22.18 Later this year, Ofcom will consult on the use of PRS in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of unencrypted programmes that are predicated on the use of PRS of a sexual nature and other programmes that promote PRS to a broadly equivalent level. Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. Ofcom might conclude, on a

case-by-case basis, that particular content predicated on PRS, including PRS of a sexual nature, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or operate as advertising (teleshopping). The latter must comply with the present BCAP Television Code and, in time, the proposed BCAP Code. At present, advertisements for PRS of a sexual nature may be carried on encrypted elements of adult channels only.

22.19 BCAP sets out below its proposal that the existing policy on TV advertisements for PRS of a sexual nature should be retained. As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal is that the present policy on TV advertisements for PRS of a sexual nature should be maintained. That proposal, however, is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.

22.20 The present BCAP TV rule states:

11.1.2

Premium rate services of a sexually explicit nature (ie those which operate on the 0909 dialling code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only

22.21 BCAP considered the policy underpinning the present rule and assessed if evidence merited, in BCAP's opinion, a change to the rule. BCAP presents here:

- i) the effect of the present rule
- ii) the policy underpinning the present rule
- iii) evidence relevant to the review of the present rule
- iv) BCAP's proposal to maintain present advertising policy and practice
- v) options that BCAP has considered and, on balance, not favoured.

i) The effect of the present rule

22.22 For the avoidance of doubt, the present rule regulates TV advertisements for PRS of a sexual nature and not advertisements for telephone chatline services, which must comply with the general requirements of the Code and, if they are offered in return for payment by premium-rate call charge, the Premium-Rate Services section of the Code. The PP+ Code of Practice prevents premium-rate chatline services from being promoted or operated as sexual entertainment services and requires that operators must use all reasonable endeavours to prevent conversation of a sexual nature. The ASA has upheld complaints about TV spot advertisements for premium-rate chatline services that have misleadingly been promoted as

PRS of a sexual nature¹. PP+'s Adjudication Panel has upheld complaints about premium-rate chatline services that have, in breach of the PP+ Code of Practice, operated as sexual-entertainment services².

- 22.23 TV advertisements for PRS of a sexual nature are restricted to encrypted elements of adult entertainment channels. BCAP considers 'adult entertainment channels' are those that wholly or mainly broadcast adult-themed sexual content, which might include adult-sex programme material and 'encrypted elements' is interpreted with reference to the relevant rule in the Ofcom Broadcasting Code:

1.24

Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN [personal identification number] protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult.

- ii) The policy underpinning the present rule

- 22.24 As indicated in Part 1 (4) of this consultation document, this review is the first thorough examination of the Television and Radio Advertising Standards Codes since the establishment of Ofcom in 2003 and of BCAP in 2004. In the main, therefore, the policies underlying the rules in the present Codes date back to the previous regulators, specifically the Independent Television Commission and the Radio Authority. In many cases, the historical rationale for those policies is no longer clear. BCAP has therefore had to make some assumptions about the origins of rules and their underlying policies, as indicated in this analysis.
- 22.25 BCAP has reviewed TV rule 11.1.2 in the light of the Communication Act's requirements to ensure that under 18s are protected and advertisements that may be misleading, harmful or offensive are prevented.
- 22.26 BCAP considered the policy underpinning the present rule possibly did not envisage long-form TV advertising for PRS of a sexual nature. The focus would have been on spot advertisements, about which viewers are not given pre-broadcast information: spot advertisements arrive unannounced and are unbidden by the audience. For the avoidance of doubt, where they invite the audience to call a premium-rate telephone number, both spot advertisements and long-form advertisements amount to teleshopping, which is defined as television-broadcast direct offers for the supply of goods and services, including immovable property, rights and obligations, in return for payment.
- 22.27 PRS of a sexual nature may not be 'sold' to under 18s. Television advertisements for products that may not be sold to under 18s and that are legal to be advertised in broadcast media are generally allowed to be broadcast on TV, subject to content and scheduling restrictions. BCAP questioned why advertisements for PRS of a sexual nature are subject to a greater restriction: they are permissible on encrypted elements of adult channels only.

1 The ASA's adjudication against Live Lines Ltd: www.cap.org.uk/NR/rdonlyres/3CD1EE8E-CC80-4B38-BCC9-7336339F40C4/0/Broadcastreport19April2006.pdf and against Channel U: www.cap.org.uk/NR/rdonlyres/3CD1EE8E-CC80-4B38-BCC9-7336339F40C4/0/Broadcastreport19April2006.pdf.

2 www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=697

The potential for serious or widespread offence

- 22.28 Both the nature of a product and the content of an advertisement can have the potential to cause serious or widespread offence. To lessen the potential for offence, the BCAP Television Code requires advertisements to comply with general or specific content and scheduling restrictions. The present restriction on advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels indicates that content and scheduling restrictions are not thought sufficient to guard against potentially serious or widespread offence being caused to the audience by advertisements for PRS of a sexual nature carried on unencrypted channels.

The protection of under 18s

- 22.29 Providers of telephone sexual entertainment services typically offer those services in return for payment by premium-rate call charge. The normal means of payment is by telephone, to which under 18s have easy access. The telephone, fixed or mobile, is also the means of delivering the product directly and immediately to the consumer. The product, in this case, might include very strong sexual content that is unsuitable for under 18s.
- 22.30 BCAP considered that the present restriction of advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels indicates that content rating and access controls for those services are thought inadequate to guard against under 18s from potentially accessing unsuitable sexual content in response to seeing an unencrypted television advertisement. In the absence of conclusive evidence linking strong sexual material to harm, especially to children, the present restriction indicates that the rule is, in part, based on a precautionary policy. (If the present rule is intended to protect under 18s from potential harm, BCAP considers it is more likely to be moral harm than financial harm, given the BCAP Television Code does not likewise restrict advertisements for premium-rate chatline services, which also may not be sold to under 18s.)

The ban on advertisements for pornography products

- 22.31 BCAP noted that, in 2002 when the present rule was published, the ITC maintained the outright ban on advertisements coming within the recognised character of pornography. BCAP did not conclude that PRS of a sexual nature necessarily fell within the recognised character of pornography, but it did accept that both types of product could include strong sexual content. BCAP considered the more permissive regime for advertisements for PRS of a sexual nature (allowed on encrypted elements of adult entertainment channels) might take into account that premium-rate services are subject to a licensed regulatory regime under PhonepayPlus (previously ICSTIS), which puts in place controls that seek to prevent under 18s' access to live chatline services, for example.

Summary of the policy underpinning the present rule

22.32 BCAP considered that the present restriction on TV advertisements for PRS of a sexual nature was thought necessary because both the very advertising of those services, and the likely content of advertisements for them, have the potential to cause serious or widespread offence to the TV audience and raise concerns about the protection of under 18s from unsuitable content. The restriction to encrypted elements of adult entertainment channels significantly reduces the chances of those advertisements being seen by adults who might be offended by the nature of the services being advertised or the likely sexual themes in the content of those advertisements. It also ensures, as far as possible on TV services, that under 18s do not form part of the viewing audience.

iii) Evidence relevant to the review of the present rule

22.33 BCAP considered if the present rule is necessary and in line with its general policy objectives as set out in Part 1 (4) of this consultation document. BCAP's consideration included a review of evidence relevant to spot advertisements for PRS of a sexual nature, on which BCAP considers the present policy was based, and to long-form advertisements for PRS of a sexual nature.

The potential for serious or widespread offence: the nature of the product

22.34 The nature of a product can have the potential to cause serious or widespread offence when that product is promoted through a TV advertisement. BCAP considered evidence with a view to assessing the public's perception of PRS of a sexual nature.

22.35 OFTEL's 2002 qualitative research on Premium-Rate Services³ found 'Few parents were overly concerned about adult [premium-rate] services. The [telephone] numbers were not felt to be widely publicised or known. Indeed, people felt children or teenagers would need to seek numbers in magazines.' Nevertheless, it also found 'A small number of parents in the sample were concerned about adult services and chatlines. The concern focused... on availability and the publicising of these services...'. BCAP noted that, since 2000, there has been a significant increase in the prevalence of PRS of a sexual nature on TV (see 'The potential for serious or widespread offence: programmes predicated on PRS of a sexual nature and long-form advertisements for PRS of a sexual nature'). The OFTEL research further found 'Adult [premium-rate] services and chatlines were generally felt to be seedy' and one respondent commented 'Adult services shouldn't be accessible for kids. Who knows what's on the end of the telephone...'.

22.36 Conversely, research indicates that regular viewers of TV programmes predicated on the use of PRS of a sexual nature did not raise concerns about excessive telephone bills or addictive behaviour and appeared to feel that they were getting what they paid for⁴. 'Harm and Offence in Media Content: a review of the evidence'⁵, which was published in 2006, found 'There is little substantive academic evidence for the potential risk of harm or offence caused through access to the professionally produced content market for mobiles'.

3 www.ofcom.org.uk/static/archive/oftel/publications/research/2002/prs_qual0802.pdf

4 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf

5 www.lse.ac.uk/collections/media@lse/pdf/Harm%20and%20Offence,%20summary.pdf

The potential for serious or widespread offence: spot advertisements

- 22.37 Unacceptable content and scheduling of an advertisement would have the potential to cause serious or widespread offence. BCAP considered evidence with a view to assessing the likelihood of serious or widespread offence being caused by unencrypted spot advertisements for PRS of a sexual nature. BCAP considered that, in keeping with the nature of the product, spot advertisements for PRS of a sexual nature have potential to include sexual themes, including sexual images and sexual language.
- 22.38 Research shows that the circumstances in which a spot advertisement is viewed affect its acceptability⁶. That relates partly to its place in the schedule, including its timing in relation to the watershed. Viewers also take into consideration the type of programme during which the advertisement appears and on which channel it is broadcast.
- 22.39 Because the BCAP Television Code restricts them to encrypted elements of adult-entertainment channels, BCAP could not draw on directly relevant complaints figures about unencrypted spot advertisements for PRS of a sexual nature as a measure of serious or widespread offence. Although they are not the only measure of offence, complaints can be an indicator. BCAP noted that spot advertisements for premium-rate chatline services, which are permitted on unencrypted TV services and can be advertised on a flirtatious theme, had not prompted a significant number of complaints to the ASA. Nevertheless, nudity, sexual themes and bad language in TV spot advertisements are often a cause for complaint for the audience⁷. 92% of people consider it suitable that spot advertisements should not be permitted to include 'strong language'⁸. Research shows that spot advertisements that show nudity and have sexual connotations are likely to cause offence⁹.

The potential for serious or widespread offence: programmes predicated on PRS of a sexual nature and long-form advertisements for PRS of a sexual nature

- 22.40 BCAP considered evidence with a view to assessing the likelihood of serious or widespread offence being caused by unencrypted long-form television advertisements for PRS of a sexual nature. In keeping with the nature of the product, and its knowledge of programmes predicated on the use of PRS of a sexual nature, BCAP considered that long-form advertisements for PRS of a sexual nature have the potential to include strong sexual themes, including sexual images and sexual language.
- 22.41 Over the last decade, there has been a significant increase in the number of TV channels that offer programmes predicated on the use of PRS of a sexual nature. Those programmes typically broadcast after the 9pm watershed and feature female presenters who invite the audience to call telephone numbers, which are almost exclusively premium-rate numbers, to engage in conversation of a sexual nature. Phone conversations with an on-screen presenter are not audible to viewers: while the presenter is on the phone, there is either recorded music or another presenter talking to viewers, usually doing little more than asking viewers to call in.

6 www.asa.org.uk/NR/rdonlyres/A9D4F1F4-E34B-44D2-8B28-43348F30D435/0/Nudity_in_Television_Advertising.pdf

7 Just under 10% of the complaints about TV advertisements received by the ASA in 2008 related to depictions of nudity, sex or bad language.

8 www.asa.org.uk/NR/rdonlyres/1EAEACA7-8322-4C86-AAC2-4261551F57FE/0/ASA_Delete_Expletives_Dec_2000.pdf (p. 3)

9 www.asa.org.uk/NR/rdonlyres/A9D4F1F4-E34B-44D2-8B28-43348F30D435/0/Nudity_in_Television_Advertising.pdf

Premium-rate text, image or video services of a sexual nature might also be offered to the audience. The female presenters dress and act in a sexual manner and the on-screen content typically becomes more sexually explicit as the night progresses. During later hours, the content of the programmes might include nudity, simulation of sex acts and strong sexual language. Those programmes are made available unencrypted to multi-channel-home audiences. On the Sky platform, channels that broadcast those programmes are confined to the Adult section of the Sky electronic programme guide (EPG).

- 22.42 Regular viewers of programmes that are predicated on PRS of a sexual nature express very few concerns about the content of those programmes, or the practices of the broadcasters of those programmes, and support 'soft' adult content being shown on those channels¹⁰.
- 22.43 Between February 2006 and February 2009, Ofcom received around 200 complaints about Participation TV services, many of which were predicated on the use of PRS of a sexual nature. The complaints include concerns about very strong sexual images and sexual language; unsuitable transmission times; the possibility of children viewing those channels; the proximity on the EPG of those channels to family-viewing channels (research indicates that 'channel flicking' continues to be the primary way of locating channels and only a few respondents said they use the EPG to find specific channels¹¹); the unencrypted nature of the content; children calling on-screen numbers for PRS of a sexual nature and participating in those services; drunken female presenters and misleading call cost information.
- 22.44 Ofcom has issued fines to four Ofcom TV licensees, totalling £87,500, for breaches of its Broadcasting Code's requirement that programmes must not show adult-sex material unless it is broadcast behind a mandatory PIN-protected encryption system between 10pm and 5.30am (see rule 1.24 of the Ofcom Broadcasting Code). Ofcom has also published findings (breaches against the Ofcom Broadcasting Code) on various channels (see in particular bulletin of 22 October 07¹²) and has had cause to remind all TV channels that broadcast those programmes about their obligations under Rule 1.24 of the Ofcom Broadcasting Code.

Protection of the under 18s

- 22.45 PRS of a sexual nature and broadcast content predicated on PRS of a sexual nature have the potential to include strong sexual content that is unsuitable for under 18s. BCAP considers that neither those services nor broadcast content that promotes them necessarily fall within the definition of pornography. BCAP considers, however, that parallels can be drawn with pornography in terms of the singularly sexual nature of those products and the likely sexual content of the broadcast content of advertisements for those products, which has the potential to include very strong sexual images and sexual language. Those advertisements' exclusion from unencrypted elements of broadcast services are likely to be borne out of the fact that products and services with strong sexual themes have the potential to cause serious or widespread offence.
- 22.46 The evidence that viewing strong sexual content harms children remains scarce given the ethical limitations on conducting such research. There is therefore little substantive academic evidence for the potential risk of harm or offence caused through access to the professionally-produced content market for mobiles¹³.

10 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 6).

11 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf

12 www.ofcom.org.uk/tv/obb/prog_cb/obb95/

13 www.lse.ac.uk/collections/media@lse/pdf/Harm%20and%20Offence,%20summary.pdf

- 22.47 The present BCAP Codes and the proposed BCAP Code require that broadcast advertisements must comply with the PhonepayPlus (PP+) Code of Practice, which requires:

Before a user may participate in a sexual entertainment service, the service provider must obtain the user's date of birth and confirmation that he has the permission of the bill-payer to use the service.

Sexual entertainment services, and promotions for them, must not contain references which suggest or imply the involvement of persons under 18 years of age.

Promotions for sexual entertainment services must not appear in media targeted at persons under the age of 18.

Save where the relevant network operator has provided an alternative solution acceptable to PhonepayPlus, all sexual entertainment services must provide a message at the beginning of the service stating that: a) the user must be over the age of 18, b) the user should be either the bill-payer or have the bill-payer's permission to call the service, c) service details may appear on the phone bill¹⁴.

Service providers must ensure that promotions for sexual entertainment services, and the services themselves, are compatible with access control and rating arrangements available for and appropriate to the medium through which they are accessible.

Providers of sexual entertainment services which can be accessed by any means at premium rate must ensure that all websites which can be accessed are content-rated with the Internet Content Rating Association (ICRA) or any other rating system that is generally accepted¹⁵.

- 22.48 BCAP is aware that operators of PRS of a sexual nature undergo training to identify callers who are likely to be under 18 and to terminate those calls immediately. The UK's mobile network operating companies and the wider UK mobile industry has established a voluntary code of practice that seeks to restrict the availability of unsuitable content to customers under the age of 18¹⁶.
- 22.49 In 2006, the PP+ Adjudication Panel recorded breaches of the PP+ Code against two service providers that had engaged under 18s in chat of a sexual nature¹⁷. In one case, 'Although the operator did not engage in sexual talk herself, she allowed... [two underage] boys to do so. When asked 'will I be allowed to have sex?' the operator even encouraged one of the boys to call after 9pm'. In the other case, 'the caller involved clearly sounded as if he was under 18 years old and that therefore the operator should have terminated the call at an early stage...the operator did not do so, but rather continued the call and engaged the caller in chat of an adult nature...'. In both cases, the numbers were promoted in the context of TV programmes predicated on the use of premium-rate live chatline service.
- 22.50 TV is present in almost all UK children's lives from an early stage, nine out of ten 8-15 year olds live in households with digital TV, and children are increasingly likely to have a greater number of media devices in their bedrooms. On average, 12-15 year olds use six media devices in their bedroom on a day-to-day basis¹⁸.

14 Rule 7.11.5 of the PhonepayPlus Code of Practice.

15 Rule 7.11.7 of the PhonepayPlus Code of Practice.

16 www.aimelink.org/docs/UK_MNO_Age_Verification_Procedures.pdf

17 www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=725 and

www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=586

18 www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ml_adult08/ml_adults08.pdf

- 22.51 Ofcom's Media Literacy Audits highlight that children's solitary use of media has increased: one in six of all children aged 8 to 15 who watch TV in their bedroom do so alone; a higher proportion of 12 to 15s and older boys do so. Children who watch TV or use the Internet in their bedrooms are less likely to have parental rules or restrictions on that use than children who use the same devices in the living room.
- 22.52 25% of people are confident that they can set a parental control PIN on their multi-channel TV sets. A minority of parents and guardians in households with digital TV impose restrictions on which channels and programmes their children can watch by setting PIN or password controls: just under a third of 8-15 year olds in households with digital TV have restricted access to certain channels or programmes because their parents or guardians have put PIN or password controls in place. Although there has been a significant increase in the use of PIN and password protection on TVs in households with 8-11 year olds since 2005 (possibly as a result of Sky having widely publicised its parental control features over the last two years), older children are more likely to have totally unrestricted access to TV. Ofcom's Media Literacy Audits state that 'those [children] with no rules in place regarding their viewing, who mostly watch without an adult present and who do not have any controls set on their television ... account for one in ten children aged 8-15. This figure increases to one in five children aged 12-15'¹⁹. Some children are able to access and use their parents' or guardians' PINs without those adults' knowledge²⁰.
- 22.53 Many more children now own mobile phones: 79% of 8-11 year olds, and 93% of 12-15 year olds, have a mobile phone²¹.
- 22.54 There is ample evidence not only that children can access sexual material but also that they actively seek it out. Many children claim to be able to subvert parental viewing rules. A significant minority of 10-year olds, and a majority of 12-14 year olds, appear positively to enjoy adult-orientated programmes (which may or may not contain sexual content)²².

iv) BCAP's proposal to maintain present advertising policy and practice

- 22.55 BCAP considered that, although the policy underpinning the present rule possibly did not envisage them, the policy is relevant to long-form television advertisements for PRS of a sexual nature. On the balance of evidence, BCAP proposes to maintain the present policy: to allow TV advertisements for PRS of a sexual nature on encrypted elements of adult entertainment channels only.
- 22.56 BCAP weighed up, on the one hand, the TV audience's possible desire to receive advertisements for PRS of a sexual nature and, on the other, the need to ensure that generally accepted standards are applied to the contents of TV services to provide adequate protection for the audience from the inclusion of offensive material and, especially for the under 18s, the inclusion of potentially harmful material. So that those obligations can be secured, the Communications Act 2003 states that BCAP's Code (under the contracting-out agreement with Ofcom):

and www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/children/children.pdf
 19 www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/children/children.pdf

(p. 42)

20 www.ofcom.org.uk/media/mofaq/bdc/bcfaq/

21

www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ml_childrens08/ml_childrens08.pdf

(p. 14)

22 www.asa.org.uk/NR/rdonlyres/AAC9A328-6525-4164-B2FA-FA5C86C5B52E/0/ASA_Young_people_media_personal_relationships_Nov_2003.pdf

321(1)(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

22.57 Evidence that BCAP found persuasive in reaching its proposal includes:

That long-form, live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Ofcom Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services.

That research suggests nudity, sexual themes or bad language in TV spot advertisements are often a cause for complaint for the audience. Research shows that spot advertisements that show nudity or have sexual connotations are likely to cause offence.

That one in ten children aged 8-15, and one in five children aged 12-15, have no rules in place regarding their viewing; most watch without an adult present and do not have any access controls set on their television.

That 'channel flicking' continues to be the primary way of locating channels.

That children can access sexual material and actively seek it out.

Television broadcasters' ability to restrict access to broadcast adult content

22.58 In reaching its proposal, BCAP took into account concerns expressed by some providers of PRS of a sexual nature that TV encryption technology was not available on all digital platforms.

22.59 BCAP understands that all digital TV platforms present the opportunity to restrict access to adult content. The means they use to achieve that varies but essentially all are able to accommodate the requirement that an audience member enters a PIN before he or she is able to view particular programmes. Encryption is possible on satellite and terrestrial platforms, although audience members need compatible receivers to be able to watch encrypted services with PIN protection of adult content. In practice, that means using a Sky receiver for satellite, while for terrestrial services a box that can accept a Conditional Access Module is required (such as a TopUpTV or ITV Digital box). For free-to-air services, it is possible to obscure the content behind PIN-protected captions. On cable, content can be assigned an age rating which, depending on the time of day and level of access chosen by the subscriber, will restrict access to certain content until an audience member enters a PIN.

Question 124

Given BCAP's policy consideration, do you agree that TV advertisements for PRS of a sexual nature should be allowed on encrypted elements of adult entertainment channels only? If your answer is no, please explain why.

Payment mechanisms for accessing telephone sexual entertainment services

- 22.60 The present rule specifies premium-rate as the method of payment for telephone sexual entertainment services. That likely reflects the fact that, at the time the rule was included in the Code, the ITC understood those services were offered in return for payment by premium-rate call charge only. BCAP's review of the rule makes clear that the present restriction on TV advertisements for those services is intended to prevent serious or widespread offence and protect children from potential harm. The restriction takes account of the wholly adult nature of the service and the potential for advertisements, particularly live broadcast material predicated on the use of telephone sexual entertainment services, to go beyond generally accepted standards on unencrypted TV channels. The method of payment is not therefore relevant to restricting those advertisements to encrypted elements of adult entertainment channels. An advertisement for a telecommunications-based sexual entertainment service that is offered in return for payment by credit card, for example, would likely be similarly restricted to encrypted elements of adult entertainment channels through other rules in the BCAP Code.

Question 125

i) Given BCAP's policy consideration, do you agree that the BCAP rule on PRS of a sexual nature should be clarified to make clear that it applies also to TV advertisements for telecommunications-based sexual entertainment services made available to consumers via a direct-response mechanism and delivered over electronic communication networks? If your answer is no, please explain why.

ii) If your answer is no to question X(i), do you consider the rule should make clear that 'premium-rate call charge' is the only permissible form of payment? If your answer is no, please explain why.

- 22.61 In line with this proposal, BCAP proposes to create a new section, entitled Telecommunications-Based Sexual Entertainment Services, in the proposed BCAP Code. Advertisements for PRS of a sexual nature would continue to be required to comply with the rules in the Premium-Rate Services section of the proposed BCAP Television Code, as well as the rules in the Telecommunications-Based Sexual Entertainment Services section.

Dialling codes

- 22.62 The present TV rule defines PRS of a sexual nature as those that operate on the 0909 dialling Code only. That is incorrect. Today, those services may operate on 0908, 0909 or 098 number ranges and on mobile short code numbers beginning 69 or 89 only. Those number ranges are designated for the purpose of premium-rate sexual entertainment services by Ofcom²³.
- 22.63 BCAP has considered if the proposed rule might reference those number ranges (either as examples or as a means of defining 'PRS of a sexual nature') because that reference might assist a broadcaster to identify immediately the nature of the service being advertised and to ensure that the advertisement complies with the rule for PRS of a sexual nature. BCAP is mindful, however, that some PRS of a sexual nature have illegitimately operated on number ranges other than those designated for those types of services²⁴. That means a broadcaster cannot rely entirely on the number on which a service operates to confirm the nature of the

²³ www.phonepayplus.org.uk/consumers/faq/default.asp#phone%20paid%20services

²⁴ www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=585

service being advertised. BCAP is mindful, too, that there is no guarantee that those number ranges will not change again.

- 22.64 On balance, BCAP proposes not to reference number ranges either as examples of, or as a means of defining, PRS of a sexual nature.

Question 126

Given BCAP's policy consideration, do you agree that BCAP's rule should not define PRS of a sexual nature as those operating on number ranges designated by Ofcom for those services? If your answer is no, please explain why.

Types of PRS services of a sexual nature

- 22.65 The present rule refers to 'voice services of a sexual nature' (emphasis added). BCAP considers it reasonable to assume that, when the rule was last reviewed, voice services (live or recorded) comprised the vast majority of telecommunications-based sexual entertainment services made available to the public, typically via a fixed phone. Today, telecommunications-based sexual entertainment services include voice, text, image or video content services.
- 22.66 The ASA and its predecessors, the Independent Television Commission and Ofcom, have interpreted the present TV rule as applying to image, text and video services of a sexual nature, not only to voice services²⁵. BCAP accepts there is a qualitative difference between voice and moving-image telecommunications-based sexual entertainment services but that that difference does not necessarily justify different advertising rules. BCAP considers that the ASA's present interpretation of the rule is proportionate and takes account of the rapid advances in communications technology.
- 22.67 BCAP proposes to reflect the custom and practice of interpreting the present rule by making clear that telecommunications-based sexual entertainment services are 'voice, text, image or video services of a sexual nature'.

Question 127

Given BCAP's policy consideration, do you agree that BCAP's rule on TV advertisements for telecommunications-based sexual entertainment services should extend to 'voice, text, image or video services of a sexual nature'? If your answer is no, please explain why.

25 The ASA's adjudication against Eckoh Technologies (5 April 2006) stated: "For the avoidance of doubt, we regard rule 11.1.2 as applying to all premium rate voice services of a sexual nature. (Premium rate text services of a sexual nature fall within the spirit of this rule)" (see www.asa.org.uk/NR/rdonlyres/DB285EE9-1D6E-439B-8D16-3131615FAE54/0/Broadcastreport5April06.pdf). The ASA's adjudication against Red Circle Technologies (20 December 2006) stated: "We do not interpret the requirement in Rule 11.1.2 for advertisements of premium rate services to be broadcast on encrypted elements of adult entertainment channels only to be limited solely to services deemed to be sexually explicit or using the 0909 dialling code" (see www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42080.htm).

BCAP proposal in summary

- 22.68 BCAP proposes to replace rule 11.1.2 of the present BCAP Television Code with rule 23.2, which it would include in a new Code section, Telecommunications-Based Sexual Entertainment Services.

THE PRESENT RULE

11.1.2

Premium rate services of a sexually explicit nature (ie those which operate on the 0909 dialling code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only

THE PROPOSED RULE

Definitions

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

23.1 – Television

Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.

- 22.69 BCAP considers that, by restricting TV advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment channels, the proposed rule prevents the potential for serious or widespread offence. It also, on a precautionary principle, protects children from seeing material that goes beyond generally accepted standards on unencrypted channels and prevents children from responding to TV advertisements for services intended for a strictly adult audience and potentially accessing those services.

Question 128

Given BCAP's policy consideration, do you agree that rule 11.1.2 in the present BCAP Television Code should be replaced by proposed rule 23.2? If your answer is no, please explain why.

Telecommunications-based live chatline services

- 22.70 The present BCAP Codes do not include a rule on TV advertisements for live chatline services. The vast majority of those are offered in return for payment by premium-rate call charge and, therefore, advertisements for them must comply with rules in the Premium-Rate Services section and the general rules of the present Codes and the proposed BCAP Code.

22.71 If the new BCAP Code allowed TV advertisements for telecommunications-based sexual entertainment services on encrypted elements of adult entertainment channels only, BCAP will undertake, in discussion with PhonepayPlus, to monitor closely the content of unencrypted advertisements for live chatline services and the content of those services. BCAP and the ASA would not allow a rule that confined advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment to be circumvented by unencrypted advertisements for live chatline services that, in breach of the BCAP Code and the PP+ Code, promoted those services as being sexual in nature or that operated as sexual entertainment services.

v) Options that BCAP has considered and, on balance, not favoured

22.72 As part of its review of TV rule 11.1.2, BCAP has considered different approaches that it could adopt in regulating advertisements for telecommunications-based sexual entertainment services. But BCAP considers that, on a preliminary review of those approaches, they do not afford the same necessary degree of protection as that that would be provided by its proposal.

22.73 BCAP considered if advertisements for telecommunications-based sexual entertainment services should be permitted on unencrypted channels subject to content rule and a scheduling restriction, such as after 9pm, 10pm, 11pm or 12am.

22.74 BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.

22.75 BCAP considered if advertisements for telecommunications-based sexual entertainment services could be regulated by distinguishing between, and applying different rules to, short- and long-form advertisements. For example, BCAP considered if a suitable approach could be to limit the broadcast of long-form advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels but allow short-form advertisements for them to be broadcast on open-access channels, subject to a scheduling restriction, or *vice versa*.

22.76 BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by TV advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.

22.77 BCAP considered amending the present rule to prohibit TV advertisements for PRS of a sexual nature. BCAP considered that that approach would be unduly proscriptive and disproportionate. The protection provided by encryption means that it is unlikely that advertisements broadcast on encrypted elements of adult entertainment channels would be seen by under 18s and by those who do not wish to see material with sexual themes. Considering the typically strong sexual content of the programmes and other advertisements broadcast on encrypted elements of adult entertainment channels, BCAP considers that a rule that entirely prohibited the advertising of those services would not proportionately protect the viewing audience from harmful or offensive material.

22.78 Conversely, BCAP considered another approach to be to delete the present rule entirely and rely on the Code's general provisions, which prevent misleading, harmful and offensive material in advertising, to regulate advertisements for PRS of a sexual nature.

22.79 BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.

Other Questions

Question 129

i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules, included in the proposed Premium-Rate Services section, are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Premium-Rate Services rules that you consider are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

BCAP'S EVALUATION OF SIGNIFICANT RESPONSES

Question 124: Given BCAP's policy consideration, do you agree that TV advertisements for PRS of a sexual nature should be allowed on encrypted elements of adult entertainment channels only? If your answer is no, please explain why.

<i>Responses received in favour of BCAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
<p>Advertising Association; Family and Parenting Institute; Institute of Practitioners in Advertising; Which?; A Faith-based Organisation; 2 TV Broadcasters</p>	<p>These respondents supported BCAP's proposal.</p> <p>-----</p> <p>-----</p> <p>Family and Parenting Institute agrees. Given that one in ten children aged 8-15, and one in five children aged 12-15, have no rules in place regarding their viewing; most watch without an adult present and do not have any access controls set on their television, this is an important rule. FPI agrees that permitting advertisements for telecommunications-based sexual entertainment services subject to content rule and a scheduling restriction, such as after 9pm, 10pm, 11pm or 12am would not adequately protect children from potentially harmful material.</p>	<p>BCAP welcomes the respondents' support of its proposal.</p> <p>-----</p> <p>BCAP agrees.</p> <p>-----</p> <p>BCAP understands that all digital TV platforms present the opportunity to restrict access to adult content. The means they use to achieve that varies but essentially all are able to accommodate the requirement that an audience member enters a PIN before he or she is able to view particular programmes.</p>

A broadcaster said BCAP should not give credence to erroneous comments that encryption is impossible, impractical or ineffective. Encryption technology is used on the cable platform as the means to ensure that only viewers that actually subscribe to particular channels are able to view those channels. Similarly, Top Up TV operates conditional access technology on the Freeview (DTT) platform through which access to channels such as Setanta Sports 1 is controlled. The broadcaster also understands that Freesat is considering the implementation of CA technology in order to support the broadcasting of, among other things, valuable HD content and pay TV services.

Which? said if people are interested in these types of products they are able to source them in other ways (on the internet / shops). If they have already signed up to an encrypted

BCAP considers its proposal to maintain the present level of restriction correctly balances the need to protect children and the right of adults to access these services.

	<p>TV channel they will be able to locate the products that they want without the TV codes being relaxed.</p>	
<p><i>Responses received against BCAP's proposal:</i></p> <p>Association for Interactive Media & Entertainment (AIME); Dr Anna Brown; The Charity Law Association; A provider of premium-rate services; Family Education Trust; Fusion Telecom Ltd; Oxygen8 Communications UK Limited, Square 1 Communications Ltd; Kenneth Williams</p>	<p><i>Summaries of significant points:</i></p> <p>AIME, Square 1 Communications Ltd and Com and a provider of premium-rate services said the requirement for encryption is unnecessary, disproportionate and costly. PIN protection alone is widely accepted, understood and an effective method of access control.</p> <p>-----</p> <p>AIME and Oxygen 8 Communications UK Ltd said a requirement to place programming of an adult nature behind encryption technology, such as a dedicated channel on a satellite service, would be commercially beneficial to the satellite service and could be interpreted as commercially restrictive or unfair.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP agrees that PIN protection is necessary. For the avoidance of doubt, that amounts to a mandatory PIN protected encryption system and not one that can be imposed voluntarily.</p> <p>-----</p> <p>BCAP understands that all digital TV platforms present the opportunity to restrict access to adult content. The means they use to achieve that varies but essentially all are able to accommodate the requirement that an audience member enters a PIN before he or she is able to view particular programmes.</p> <p>-----</p> <p>BCAP considers its review of the present rule correctly takes into account the audio-visual nature of broadcast television, its broad reach and its place in the family home.</p> <p>-----</p> <p>1 & 2 BCAP considers that that approach would not adequately protect members of the audience who could be seriously offended by advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately</p>

	<p>----- -----</p> <p>The Charity Law Association said Babe Chat ads are freely accessible in non-broadcast media and their content is regulated. [Note the respondent's response to q.128]</p> <p>----- -----</p> <p>1. A provider of premium-rate services and Square 1 Communications Ltd said that Adult promotions should be allowed on open-access TV but restricted to viewing after the watershed.</p> <p>2. A provider of premium-rate services said those promotions should be restricted in areas that are effectively designated adult sections that contain Adult</p>	<p>protect children from potentially harmful material.</p> <p>3. BCAP agrees. BCAP considers, however, that PIN protection is necessary. For the avoidance of doubt, that amounts to a mandatory PIN protected encryption system and not one that can be imposed voluntarily.</p> <p>4. BCAP's review did take that into account: "On the Sky platform, channels that broadcast those programmes are confined to the Adult section of the Sky electronic programme guide (EPG)." BCAP considers PIN protection must amount to a mandatory PIN protected encryption system and not one that can be imposed voluntarily.</p> <p>-----</p> <p>BCAP notes that in June 2009, Ofcom conducted research into 'Attitudes towards Sexual Material on TV' (by Opinion Leader), "to ensure that the application of its rules on sexual material is informed by a detailed understanding of current attitudes towards a range of sexual material that can be viewed on television" (p.4) The research concluded: "a wide range of factors such as context, editorial justification and mandatory access restrictions were extremely important when considering generally accepted standards." (p.69). "Most considered that stronger sexual material required stronger editorial justification and should be subject to a wider range of contextual conditions. Participants voiced the need for mandatory restrictions where appropriate, depending</p>
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	<p>programming.</p> <p>3. Square 1 Communications Ltd said those promotions should be restricted to areas that have sufficient access control mechanisms.</p> <p>4. A provider of premium-rate services said BCAP's review has not taken account of the fact that all adult channels are restricted into one section on the sky EPG which the individual can restrict in its entirety by pin.</p> <p>----- -----</p> <p>Fusion Telecom Ltd said the current content standards on Babe TV are within the bounds of decency allowed on channels of this type. Other TV programmes contain far stronger sexual</p>	<p>on the type and strength of sexual material." (p.69) The conclusions made clear there was a "... need for mandatory access restrictions for content perceived to be for the primary purpose of sexual arousal." In its viewer research on PTV, prepared by Essential, page 6 states "All respondents implied that the purpose of watching or calling 'Babe' channels was normally sexual gratification, although the channels were also seen as entertaining or amusing"</p> <p>The research would appear to indicate that viewers' consideration of sexual material takes into account the 'editorial merit' of the broadcast material. Where there is little or no editorial merit and the primary purpose of the broadcast material is to sexually arouse the viewer, the case for mandatory access restrictions appears to be strongest. BCAP considers these findings support its proposal to maintain the present level of restriction on Babe Chat TV.</p> <p>-----</p> <p>BCAP considered that an outright ban on ads for telecommunications-based sexual entertainment services would be unduly proscriptive and disproportionate. The protection provided by encryption means that it is unlikely that ads broadcast on encrypted elements of adult entertainment channels would be seen by under 18s or by those who do not wish to see material with strong sexual themes. Considering the typically strong sexual content of the programmes and other ads broadcast on encrypted elements of adult entertainment channels, BCAP considers that a rule that prohibits the broadcast advertising of those services is not merited.</p>
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	<p>material. TV programmes such as 'Playboy Mansion' can be aired at any time of the day, with the relevant naughty bits turned into a few pixels (before 9pm)! In the evenings you have extremely gratuitous content with TV programmes like 'Sexcetera'.</p>	
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Family Education Trust and an individual (Kenneth Williams) said ads for these services should not be allowed on TV, whether on open access or behind encryption. Family Education Trust said these ads provide a serious danger to children and young people and to society at large. It is not convinced that the current safeguards are sufficient to prevent under 18s from accessing PRS of a sexual nature. It said sexual services can be accessed on some cable televisions simply by 'channel flicking' which as the consultation document notes 'continues to be the primary way of locating channels'. With 79 per cent of 8-11 year olds and 93 per cent of 12-15 year olds possessing their own mobile phone, a high proportion of children now have potentially easy access to adult chat lines. Many also have TVs in their bedroom. Pressures placed on parents often make it difficult for them to sufficiently control the

	material their children are exposed to.	
<p>Question 125:</p> <p>i) Given BCAP’s policy consideration, do you agree that the BCAP rule on PRS of a sexual nature should be clarified to make clear that it applies also to TV advertisements for telecommunications-based sexual entertainment services made available to consumers via a direct-response mechanism and delivered over electronic communication networks? If your answer is no, please explain why.</p> <p>ii) If your answer is no to question 125(i), do you consider the rule should make clear that ‘premium-rate call charge’ is the only permissible form of payment? If your answer is no, please explain why.</p>		
<p><i>Responses received in favour of BCAP’s proposal from:</i></p> <p>Advertising Association; The Charity Law Association; Family and Parenting Institute; Institute of Practitioners in Advertising; 2 TV Broadcasters; A Faith-based organisation.</p>	<p><i>Summaries of significant points:</i></p> <p>These respondents supported BCAP’s proposal.</p> <p>-----</p> <p>Family and Parenting Institute agrees. The underlying reason for the guidance is the protection of minors from viewing material of a sexual nature rather than the payment method.</p>	<p><i>BCAP’s evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents’ support of its proposal.</p> <p>-----</p> <p>BCAP agrees.</p>
<p><i>Responses received against BCAP’s proposal:</i></p> <p>Association for Interactive Media & Entertainment (AIME); A provider of premium-rate services; Square</p>	<p><i>Summaries of significant points:</i></p> <p>Question i)</p> <p>AIME and Square 1 Communications Ltd said it is sufficient to refer to “TV ads for telecommunication based sexual entertainment services”. AIME and</p>	<p><i>BCAP’s evaluation of those points and action points:</i></p> <p>BCAP’s definition is intended, as far as possible, to avoid unintended consequences and limit the rule</p>

<p>1 Communications Ltd</p>	<p>Square 1 Communications Ltd and a provider of premium-rate services said the reference to direct response mechanism and delivery method is not understood.</p> <p>Question ii)</p> <p>AIME and a provider of premium-rate services said it is not acceptable to restrict the consumers' options of payment methods.</p> <p>AIME and Square 1 Communications Ltd added this is outside of BCAP remit.</p>	<p>to those products and services intended to be caught by it. BCAP's review makes clear that the direct response nature of these ads, coupled with the immediate delivery of products to telecommunications-based devices, are material factors that are relevant to BCAP's concern to adequately protect under 18s. BCAP considers its definition provides clarity for users of the Code.</p> <p>BCAP agrees.</p> <p>BCAP's remit is broadcast advertising; its Code regulates broadcast ads carried on channels licensed by Ofcom, including broadcast ads for or that include premium-rate services.</p>
<p>Question 126: Given BCAP's policy consideration, do you agree that BCAP's rule should not define PRS of a sexual nature as those operating on number ranges designated by Ofcom for those services? If your answer is no, please explain why.</p>		
<p><i>Responses received in favour of BCAP's proposal from:</i></p> <p>Advertising Association; Association for Interactive Media & Entertainment (AIME); The Charity Law Association; A provider</p>	<p><i>Summaries of significant points:</i></p> <p>These respondents supported BCAP's proposal.</p> <p>-----</p> <p>PhonepayPlus said it agrees with the BCAP assessment that there is no guarantee the number ranges will not change again. In addition</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents' support of its proposal.</p> <p>-----</p> <p>BCAP welcomes PP+'s comments..</p>

<p>of premium-rate services; Family and Parenting Institute; Institute of Practitioners in Advertising; PhonePayPlus; A TV broadcaster; Square 1 Communications Ltd; A faith-based organisation</p>	<p>PhonepayPlus observe that such services may, in future, be provided over VoIP networks on numbers which would not necessarily require Ofcom allocation. Therefore, PhonePayPlus agrees with BCAP's view.</p>	
<p><i>Responses received against BCAP's proposal:</i></p> <p>A TV broadcaster</p>	<p><i>Summaries of significant points:</i></p> <p>A TV broadcaster said a reference to these number ranges as <i>examples</i> of PRS of a sexual nature would be helpful.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP considers that if guidance is necessary to support the rule, it may consider including number ranges as examples of PRS of a sexual nature.</p>
<p>Question 127: Given BCAP's policy consideration, do you agree that BCAP's rule on TV advertisements for telecommunications-based sexual entertainment services should extend to 'voice, text, image or video services of a sexual nature'? If your answer is no, please explain why.</p>		
<p><i>Responses received in favour of BCAP's proposal from:</i></p> <p>Advertising Association; The Charity Law Association; Association for Interactive Media & Entertainment (AIME);</p>	<p><i>Summaries of significant points:</i></p> <p>These respondents supported BCAP's proposal.</p> <p>-----</p> <p>AIME, Square 1 Communications Ltd and a provider of a provider of premium-rate services said it is not</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents' support of its proposal.</p> <p>-----</p> <p>The reference to 'voice, text, image or video</p>

<p>A provider of premium-rate services; Family Education Trust; Institute of Practitioners in Advertising; Square 1 Communications Ltd; A TV broadcaster; A faith-based organisation</p>	<p>necessary to attempt to quantify all possible options for service delivery. It should be sufficient to simply refer to “entertainment services of a sexual nature” (AIME) or “services of a sexual nature” (A provider of premium-rate services.).</p>	<p>services of a sexual nature’ is included in the definition. BCAP considers it gives clarity to users of the Code and, unlike the reason behind its decision to drop number ranges from the rule, the reference is very unlikely to become outdated.</p>
<p><i>Responses received against BCAP’s proposal:</i></p>	<p><i>Summaries of significant points:</i></p> <p>Not one respondent objected to BCAP’s proposal.</p>	<p><i>BCAP’s evaluation of those points and action points:</i></p>
<p>Question 128: Given BCAP’s policy consideration, do you agree that rule 11.1.2 in the present BCAP Television Code:</p> <p>11.1.2 Premium rate services of a sexually explicit nature (ie those which operate on the 0909 dialling code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only</p> <p>should be replaced by proposed rule 23.2:</p> <p>23.2 – Television only Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.</p> <p>If your answer is no, please explain why.</p>		
<p><i>Responses received in favour of BCAP’s proposal from:</i></p>	<p><i>Summaries of significant points:</i></p>	<p><i>BCAP’s evaluation of those points and action points:</i></p>

<p>Advertising Association; The Charity Law Association; Institute of Practitioners in Advertising; 2 TV broadcasters; STV; A faith-based organisation.</p>	<p>These respondents supported BCAP's proposal.</p> <p>-----</p> <p>The Charity Law Association agreed provided that "telecommunications based" is defined as excluding broadcast material e.g. cable, satellite, IPTV and similar or it could be impossible to broadcast/advertise encrypted services otherwise than through an encrypted service. [Note the respondent's response to q.124]</p> <p>-----</p> <p>A TV broadcaster supported BCAP's proposal to maintain the present level of restrictions on ads for sex chat services. It found these factors persuasive in reaching its decision:</p> <ul style="list-style-type: none"> • “Standards Objectives”: the requirement to ensure that persons under the age of 18 are protected is the first of the standards objectives listed in the Communications Act. It is, therefore, clearly a key consideration when establishing broadcast advertising standards. • Explicit sexual content: adult chat services have broadcast very explicit sexual content in breach of the Ofcom Broadcasting Code. The TV broadcaster claims these breaches result from matters that have been drawn to Ofcom's attention and not, for example, through monitoring, which may expose more breaches. 	<p>BCAP welcomes the respondents' support of its proposal.</p> <p>-----</p> <p>BCAP considers the rule does not apply to ads for channels or programmes that transmit broadcast material falling within the recognised character of telecommunications based sexual entertainment services, unless those ads include a direct response mechanism for the provision of those services.</p> <p>-----</p> <p>BCAP welcomes the respondent's submission, which reflects and agrees with much of BCAP's review and which also highlights relevant findings from Ofcom's June 2009 research into 'Attitudes towards Sexual Material on TV' (by Opinion Leader), which BCAP had not referenced in its review of existing TV rule 11.1.2.</p>
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- **Live services:** The risk of very strong sexual content that exceeds generally accepted standards is exacerbated by the fact that these services are broadcast live. The live nature of these programmes reduces scope for editorial control. It is not, according to the broadcaster, feasible to implement a delay on the broadcasting of adult chat TV services given that the on-screen presenters engage in live telephone conversations with viewers.
- **An adverse effect of competition:** Given the relatively fragile economics of adult chat TV services (and the plethora of such channels that are currently being broadcast), it is likely that the on-screen presenters will, in future, be encouraged to be more explicit in order to attract more viewers and raise greater revenue.
- **Ofcom research on attitudes to sexual material, published 15 June 2009:** *“Where sexual material was considered to be “too strong” to be broadcast without mandatory access restrictions in place, it was because it appeared to have a primary purpose of arousing viewers i.e. an excuse to show what participants referred to as “porn” and not to be justified in terms of plot, character development or editorial context”* (Page 169 of Ofcom’s Broadcasting Code Review). The TV broadcaster said there is no plot, character development or editorial context in adult chat TV services. Those services clearly have a primary purpose of *“arousing viewers”* and thus would be *“considered to be “too strong” to be broadcast without mandatory access restrictions in place”*.

Ofcom's recent research supports BCAP's proposal to maintain its current approach to TV advertisements for PRS of a sexual nature.

- The same research confirms that: *“Overall, protection of under 18s was the main concern with respect to sexual material as this group was seen to be at risk of harm from exposure to such material. Participants raised two issues in particular. Firstly, the need to protect younger children from stumbling across sexual content (unintentional viewing) was raised across all demographic groups, including non-parents, although it was a greater concern for parents. Secondly, the need to restrict older children from seeking it out (intentional viewing) was raised, mostly by parents of children in this age group”.* (Page 163 of Ofcom's Broadcasting Code Review.)
- **Under eighteens' access to sex chat PRS products:** Given the ease of access by under 18s to telephones and the absence of robust age-verification in respect of their use, BCAP must seek to minimise the potential for under 18s to view advertisements for PRS of a sexual nature in order to discharge the statutory duty to protect under 18s. In practice, the nature of the sexually explicit PRS, which are advertised on adult chat TV services, is extremely graphic and entirely unsuitable for under 18s, as would be amply demonstrated if BCAP were to sample such PRS. If such sexually explicit audio content were to be broadcast on a free to air basis, it would certainly not be consistent with the Broadcasting Code, and would be borderline

permissible even on an encrypted adult channel. In light of this sexually explicit audio content, the need to adopt a precautionary approach for the protection of under 18s is heightened in respect of such PRS.

- **Children's TV viewing habits:** The prevalence of TV in almost all children's lives from an early stage, the growing tendency for children to watch TV in their bedrooms alone, the limited use of parental controls for access to TV content and the ability of children to subvert parental viewing rules, all demonstrate that mere scheduling restrictions (which could enable the broadcasting of advertisements for PRS of a sexual nature at certain times and/or on certain unencrypted channels) would not achieve the necessary degree of protection in respect of under 18s and thus would not discharge the statutory duty in this regard in the Communications Act.

Alternative Options

A TV broadcaster agreed that the alternative options for regulating premium-rate sexual entertainment services did not adequately meet the relevant standards objectives. It agrees with this conclusion because.

- **Scheduling restriction on open access TV:** a scheduling restriction in respect of advertisements for PRS of a sexual nature would not adequately protect under 18s for the reasons provided above. This view is supported by Ofcom's recent research which confirms that: *"There was also some concern that the*

BCAP welcomes the respondent's submission, which reflects and agrees with much of BCAP's review and which highlights relevant findings from Ofcom's June 2009 research into 'Attitudes towards

	<p><i>watershed might not provide sufficient protection for older children and young people who were likely to be watching television after 21.00 and/or who might actively seek out stronger sex material that is transmitted without mandatory access restrictions". (Page 165 of Ofcom's Broadcasting Code Review.)</i></p> <ul style="list-style-type: none"> • Relaxation for short-form ads for PRS of a sexual nature: It is clear that there is potential for both short-form and long-form advertisements for PRS of a sexual nature to cause widespread offence and/or expose under 18s to extremely sexually explicit material. • Relying on the Code's general provisions: For the reasons explained in section 3 above, mere reliance on the general provisions of the Code would not be adequate. To date, adult chat TV services have been regulated as editorial rather than advertising and, as a consequence, such services have been subject to the general provisions of Ofcom's Broadcasting Code. Those general provisions have certainly not prevented many serious breaches of the Code by adult chat TV services. It is clear, therefore, that there is a benefit to a bespoke rule on this issue. 	<p>Sexual Material on TV' (by Opinion Leader), which BCAP had not referenced in its review of existing TV rule 11.1.2.</p>
<p><i>Responses received against BCAP's proposal:</i></p> <p>3C Limited; Adalsys Ltd; Association for</p>	<p><i>Summaries of significant points:</i></p> <p>Levels of viewer / consumer complaint</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>Levels of viewer / consumer complaint</p>

<p>Interactive Media & Entertainment (AIME); 12 Adult chat TV presenters; 2 providers of premium-rate services; Family Education Trust; Harvan Europe Ltd; Netcollex Limited; 2 producers of an adult chat TV programme.</p>	<p>Adalsys Ltd, two producers of an adult chat TV programme and Fusion Telecom Ltd said there is no evidence of consumer harm arising from these broadcast services; there is no 'need' to intervene. Adalsys Ltd and a provider of premium-rate services said better regulation necessitates that regulatory intervention should be targeted where action is needed.</p>	<p>BCAP arrived at its proposal to maintain the present level of restriction on ads for telecommunications-based sexual entertainment services after a full and transparent review of relevant factors. Factors that BCAP found persuasive in reaching its decision include:</p> <ul style="list-style-type: none"> • That long-form, live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Ofcom Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services. • That research suggests nudity, sexual themes or bad language in TV spot advertisements are often a cause for complaint for the audience. • Research shows that spot advertisements that show nudity or have sexual connotations are likely to cause offence. • That one in ten children aged 8-15, and one in five children aged 12-15, have no rules in place regarding their viewing; most watch without an adult present and do not have any access controls set on their television. • That 'channel flicking' continues to be the primary way of locating channels. That children can access sexual material and actively seek it out. <p>BCAP has invited and fully considered responses to its proposal. BCAP has not been presented with evidence that persuades it to change its proposal. On the contrary, given its objective to ensure that persons under the age of eighteen are protected and that generally</p>
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	<p>-----</p> <p>3C Limited said Babe TV generates very low levels of consumer complaints.</p> <p>Harvan Europe Ltd said in 3 years of broadcasting the free to air babe industry has NOT generated around 200 complaints (see respondent's comments to qu.128) but less than 120 complaints (and many of these are suspect in their origin). This volume of complaints is pitifully small by comparison to complaints received for the broadcasting of sexually explicit content by other broadcasters (Channel 4 by example received 153 complaints for one programme alone).</p> <p>-----</p> <p>Breaches of the present regulations</p> <p>3C Limited said paragraphs 22.44 – 22.49 demonstrate that the present regulations work and the industry has its house in order.</p>	<p>accepted standards are applied to the contents of television services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material, BCAP considers its rule has been endorsed through public consultation. BCAP considers its review of this rule has taken full account of better regulation principles and that the rule is necessary for the purposes of achieving the relevant Standards Objectives.</p> <p>-----</p> <p>BCAP's review acknowledged that although they are not the <u>only</u> measure of offence, complaints can be an indicator of levels of offence. In BCAP's view, its review did not place disproportionate significance on the level or nature of complaints.</p> <p>(See below: Paragraph 22.43 of the BCAP Consultation)</p> <p>-----</p> <p>--</p> <p>Paragraphs 22.44 and 22.49 include information relating to serious breaches of the Ofcom Broadcasting Code and the PhonepayPlus Code of Practice. BCAP considers those breaches do not</p>
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	<p>-----</p> <p>Supporting industry</p> <p>3C Limited said BCAP and Ofcom should support and encourage enterprise, including the PTV industry, in the absence of any compelling reasons to the contrary. Adalsys Ltd and Netcollex Limited said many of these businesses are prime drivers of new technologies. Adalsys and two producers of adult chat TV programmes said the industry employs many thousands of people (A provider of premium-rate services said the figure was over 1000; Harvan Europe Ltd said over 3000 people are employed through Babe Chat and Psychic Chat TV services) whose jobs would be put at risk by the BCAP proposals. Adalsys Ltd said the premium rate industry alone is estimated to generate revenues in the order of millions of pounds per annum yielding to the Exchequer valuable tax revenues which stand to be lost.</p> <p>-----</p> <p>Essential report – commissioned by Ofcom</p> <p>12 Adult chat TV presenters (using the same letter template) and Harvan Europe Limited said BCAP had been selective and misleading in its use of findings from this research.</p> <p>12 Adult chat TV presenters (using the same letter</p>	<p>suggest that the TV adult chat industry has its house in order or that the present editorial restrictions that are in place are adequate to prevent strong sexual content from reaching the audience, including children in the audience.</p> <p>-----</p> <p>--</p> <p>BCAP understands its duty to protect the audience from the inclusion of harmful or offensive material in advertising must be balanced with advertisers' fundamental right to freedom of expression. BCAP considers it reasonable to restrict that right if it is necessary to protect the audience from harm or serious or widespread offence.</p> <p>-----</p> <p>BCAP referenced this report three times. Two references included 'positive' information on</p>
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template) and Harvan Europe Limited pointed to these paragraphs of the Essential report:

1.4.6: *“Respondents who watched ‘Babe’ TV had pragmatic views about the programming and expressed very few concerns about content or practices. There was strong support for “soft” adult content on television. For most respondents, the channels were felt to provide a dual benefit through telephone interaction with “girls” and through engaging on-screen content. All respondents implied that the purpose of watching or calling ‘Babe’ channels was normally sexual gratification, although the channels were also seen as entertaining or amusing. Respondents did not raise concerns about excessive telephone bills or addictive behaviour, and appeared to feel that they were getting what they paid for.”*

7.1.1: *“Despite some respondents’ suggestions of inappropriate conduct on the part of Quiz TV or Psychic TV operators (see Section 6), there was also a general sense that the genres were robustly regulated, since all television channels in general were felt to be subject to certain codes or regulations.*

7.1.2: *“However, respondents expressed some concern if PTV were to be subjected to what they saw as “nanny-state” intervention. As discussed earlier, many felt that as adults they were responsible for their own actions and that tighter regulation was unnecessary. However, respondents were not presented with any potential regulatory options for discussion in this research”,*

programmes predicated on PRS of a sexual nature:

- Conversely, research indicates that regular viewers of TV programmes predicated on the use of PRS of a sexual nature did not raise concerns about excessive telephone bills or addictive behaviour and appeared to feel that they were getting what they paid for
- Regular viewers of programmes that are predicated on PRS of a sexual nature express very few concerns about the content of those programmes, or the practices of the broadcasters of those programmes, and support ‘soft’ adult content being shown on those channels

The third simply referenced how viewers access these services:

- research indicates that ‘channel flicking’ continues to be the primary way of locating channels and only a few respondents said they use the EPG to find specific channels

BCAP considers there is no suggestion that it intended to mislead or did mislead readers of the consultation in its reference to the Essential Report findings. BCAP’s review properly directed the reader to the report and included accurate and relevant extracts for the purposes of the review.

The Act's Standards Objectives

A provider of premium-rate services said all the Psychic Chat and Babe Chat and programmes for which it supplies premium-rate telephony services meet the standards objectives set out in Section 319(2) of the Act.

Other rule options

A provider of premium-rate services called for a contextual rule, which would place advertising in a similar editorial environment to what is being advertised on adults only channels that are not necessarily encrypted but have some sort of protection mechanism in place for minors.

A provider of premium-rate services said BCAP's

BCAP has presented evidence that long-form, live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Ofcom Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services.

BCAP considers that by restricting TV advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment channels, the proposed rule prevents the potential for serious or widespread offence. It also, on a precautionary principle, protects children from seeing material that goes beyond generally accepted standards on unencrypted channels and prevents children from responding to TV advertisements for services intended for a strictly adult audience and potentially accessing those services.

	<p>review had not laid out all its considerations of the options available.</p> <p>-----</p> <p>Plurality of content</p> <p>Netcollex Limited said these services provide entertainment for a lot of people. A producer of an adult chat programme and a number of its presenters said the programmes are a highly interactive content driven production using lots of humour, themes and stage props to achieve this.</p>	<p>-----</p> <p>BCAP disagrees and points to paragraphs 22.72 – 22.79 in support of its view.</p> <p>-----</p> <p>The Essential Report commissioned by Ofcom and referenced in BCAP’s consultation document states that 6% of all viewers aged 16-64 have watched adult chat channels in the last 12 months and only 1% watch them regularly (p10). BCAP is not persuaded that this information suggests its proposed rule is disproportionate.</p>
<p><i>Other</i></p> <p>3C Limited; Adalsys Ltd; Association for Interactive Media & Entertainment (AIME); 20 Adult chat TV presenters (using the same letter template); 2 providers of premium-rate services; Fusion Telecom Ltd, Harvan Europe Limited;; 2 TV broadcasters; Mobile</p>	<p>Paragraph 22.43 of the BCAP Consultation</p> <p>3C Limited said the information presented in paragraph 22.43 is meaningless without context. An average of just one complaint per week. No cause for concern.</p> <p>Adalsys Ltd, Peripatos, A provider of premium-rate services, Limited, Square 1 Communications Ltd, the Participation Television Broadcasters Association Ltd and a producer of an adult chat programme said that information is factually incorrect; the reader of the consultation is given a misleading impression of the actual evidence. Harvan Europe Limited said either</p>	<p>Paragraph 22.43 of the BCAP Consultation</p> <p>BCAP does not accept that paragraph 22.43 contains significant inaccuracies. BCAP is content that “many [of the 200 complaints] were predicated on the use of PRS of a sexual nature”. BCAP published the complaints information simply to indicate that some viewers are offended by the nature or scheduling of some PTV services, such that viewers take the trouble to register a complaint with the regulator.</p> <p>BCAP considers those reading the consultation</p>

<p>Entertainment Forum (MEF); Netcollex Limited; The Participation Television Broadcasters Association Ltd; Peripatos Limited; 2 producers of adult chat TV programmes; Square 1 Communications Ltd.</p>	<p>Ofcom has given inaccurate information to BCAP or BCAP has failed to present it accurately.</p> <p>Adalsys Ltd said BCAP had selected only those facts which suit its cause (or that of another agency to whom it is accountable, Ofcom).</p> <p>Peripatos Limited said it wrote to Ofcom under the Freedom of Information Act requesting further details on information provided in paragraph 22.43.</p> <p>Ofcom responded by providing the following information:</p> <p>"the around 200 complaints" was in fact 153 complaints which by category comprised: sex/nudity 110, use of premium rate numbers 14, inaccuracy/misleading 28, scheduling 1</p> <p>Of the 153 complaints only 27 resulted in a finding of breach broken down as follows: sex/nudity 24, use of premium rate numbers 1, inaccuracy/misleading 1, scheduling 1. Of the 27, 4 were for a failure to provide a recording.</p> <p>Ofcom confirmed they hold no published information regarding "drunken presenters". They explained that they did receive one "particular complaint" which did not result in them finding the broadcaster in breach.</p> <p>Of the complaints: 22 were from individuals complaining on behalf of an organisation, 6 were initiated by Ofcom as a result of representations from a co-regulator such as ASA or PPP, 127 were from members of the public.</p>	<p>document will read paragraph 22.43 in the context of a review that considered a range of material information relevant to the review of existing TV rule 11.1.2. Paragraph 22.43 was preceded by a paragraph (22.42) making it clear that "regular viewers of programmes that are predicated on PRS of a sexual nature express very few concerns about the content of these programmes, or the practices of the broadcasters of these programmes". The following paragraph (22.44) reported on findings of breaches of the Ofcom Broadcasting Code made by Ofcom, and it will have been clear to readers that numbers of complaints do not equate to the number of formal investigations and finding of breaches. Moreover, it can be seen that the evidence which BCAP found persuasive in reaching its initial view did not include the level of complaints received by Ofcom referred to in paragraph 22.43.</p>
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Peripatos Limited and Square 1 Communications Ltd said BCAP had inaccurately reported the number of complaints - whether this is their doing or the fault of Ofcom in providing them with the information is not clear. That had the effect of giving the public a distorted view of the number of complaints received - BCAP has inflated the number of complaints by close to 25%. BCAP's reporting of the "around 200 complaints" does not fairly reflect the nature and context of the complaints. This cannot be correct. Not only is the figure way off the mark, but no mention is made of the fact that less than 20% of the complaints resulted in a breach finding and even then 4 of the breaches were for the failure to supply a recording.

Paragraph 22.41 of the BCAP Consultation

A producer of an adult chat TV programme and 19 of its TV presenters (using the same letter template)said:

- the emphasis placed by BCAP on "sex" is misleading
- under rules for unencrypted broadcast, presenters cannot engage in any activity which could be seen as an adult-sex work or "sexually explicit".
- the reference to "nudity" is misleading; full nudity is forbidden; the reference to the "simulation of sex acts" is misleading; and the reference to the

BCAP does not agree that its review unfairly or inaccurately describes the broadcast content of sex chat services.

BCAP understands that Ofcom's rules are intended to prevent the level of content referred to by the respondents on open-access TV.

"During later hours, the content of the programmes might include nudity, simulation of sex acts and

use of “strong sexual language” is misleading.

Paragraph 22.35

A provider of premium-rate services said research conducted in 2002, referenced in paragraph 22.35 of BCAP’s review, is not reflective of the current landscape. Today, adult content is restricted to the adult section of the Sky EPG.

Paragraph 22.57

Harvan Europe Ltd said, in paragraph 22.57, BCAP refers to 'evidence' that long-form live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services. Harvan Europe Ltd said BCAP do not provide this 'evidence' or any sources for such a conclusion (presented in such a way as to mislead the reader)

Timing of BCAP’s consultation

strong sexual language.” BCAP does not accept that this paragraph is inaccurate.

Paragraph 22.35 states:

BCAP noted that, since 2000, there has been a significant increase in the prevalence of PRS of a sexual nature on TV.

BCAP considers that is reflective of the current landscape. BCAP understands that adult chat TV operates on digital platforms other than Sky, where they are not necessarily similarly restricted on the respective EPG.

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BCAP has referenced and provided a link to that information in paragraph 22.44.

AIME, Adalsys Ltd, Netcollex Limited, a provider of premium-rate services and a producer of adult chat TV, The Participation Television Broadcasters Association Ltd, Square 1 Communications Ltd and 3C Limited said the outcome of BCAP's consultation should be deferred until the current Ofcom consultation process is completed.

A TV broadcaster said it recognises the complexity of this area, and notes (as BCAP indeed has done in the Code Review consultation document) that BCAP may need to revisit the rules in this area once Ofcom publishes its next document on participation TV.

Use of the term Pornography

Fusion Telecom Ltd said it was concerned by BCAP's use of the term 'pornography' in its consideration of ads for Babe Chat services. It said the term was emotive and misleading in this context, and viewers of these services do not regard Babe Chat as 'pornography'.

BCAP's consultation states its "proposal ..., is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom."

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BCAP's reference to pornography included:

BCAP did not conclude that PRS of a sexual nature necessarily fell within the recognised character of pornography, but it did accept that both types of product could include strong sexual content. (Para 22.31)

And

BCAP considers that neither those services nor broadcast content that promotes them necessarily fall within the definition of pornography. BCAP

	<p>-----</p> <p>Separate Section</p> <p>MEF, AIME and Square 1 Communications Ltd can see no need to create a new section, entitled Telecommunications-Based Sexual Entertainment Services, in the proposed BCAP Code. MEF said advertisements for PRS of a sexual nature should be required to comply with the PpP Code of Practice and be enforced by PpP.</p> <p>-----</p> <p>Chit-chat / Flirt-Chat lines</p> <p>A TV broadcaster said during the day time, adult chat TV services advertise PRS numbers in the 0906 range. Such numbers are not intended to be used for adult chat services. The conversations which result from viewers being prompted by adult chat TV services during the day time to call such 0906 numbers necessarily become adult in nature. In the circumstances, given that these PRS are being advertised during the day time, in order to protect under 18s it is again critical that the advertisements for these PRS are only broadcast on the encrypted elements of</p>	<p>considers, however, that parallels can be drawn with pornography in terms of the singularly sexual nature of those products and the likely sexual content of the broadcast content of advertisements for those products, which has the potential to include very strong sexual images and sexual language. (para 22.45)</p> <p>BCAP considers its references to pornography are legitimate for the purposes of reviewing existing TV rule 11.1.2 and appropriately qualified.</p> <p>-----</p> <p>BCAP's rule covers TV ads for all telecommunications-based sexual entertainment services and not just those based on PRS. For the avoidance of doubt, those based on PRS must conform to the rules in section 22.</p> <p>-----</p> <p>Chit chat / flirt chat lines do not, in BCAP's opinion, raise the same type or extent of regulatory concerns as ads for sex chat lines and BCAP is not persuaded that ads for chit chat / flirt chat lines should be confined to encrypted elements of adult entertainment channels only. BCAP made clear in its consultation that:</p>
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	adult entertainment channels.	<p>The present BCAP Codes do not include a dedicated rule on TV advertisements for live chatline services. The vast majority of those are offered in return for payment by premium-rate call charge and, therefore, advertisements for them must comply with rules in the Premium-Rate Services section and the general rules of the present Codes and the proposed BCAP Code.</p> <p>If the new BCAP Code allowed TV advertisements for telecommunications-based sexual entertainment services on encrypted elements of adult entertainment channels only, BCAP will undertake, in discussion with PhonepayPlus, to monitor closely the content of unencrypted advertisements for live chatline services and the content of those services. BCAP and the ASA would not allow a rule that confined advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment to be circumvented by unencrypted advertisements for live chatline services that, in breach of the BCAP Code and the PP+ Code, promoted those services as being sexual in nature or that operated as sexual entertainment services.</p>
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Question 129:

- i) Taking into account BCAP’s general policy objectives, do you agree that BCAP’s rules, included in the proposed Premium-Rate Services section, are necessary and easily understandable? If your answer is no, please explain why?**
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the**

proposed Premium-Rate Services rules that you consider are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

<i>Responses received from:</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
<p>i)</p> <p>Advertising Association; The Charity Law Association; A provider of premium-rate services; Institute of Practitioners in Advertising; A TV broadcaster; A faith-based organisation</p> <p>iii)</p> <p>Association for Interactive Media & Entertainment (AIME)</p>	<p>i)</p> <p>The Charity Law Association and a provider of premium-rate services said that the rules were not easily understandable. The Charity Law Association said that the rules did not take account of constantly changing technologies.</p> <p>iii)</p> <p>AIME said the regulation of PRS is adequately covered by the existing PhonepayPlus Code of Practice.</p>	<p>BCAP disagrees.</p> <p>TV and radio broadcasters are required, by the terms of their Ofcom licence, to ensure ads that include premium-rate services (PRS) comply with the PhonepayPlus Code of Practice. With the exception of ads for political and controversial matters, the ASA must consider complaints about all broadcast ads that are covered by the present BCAP Codes and the proposed BCAP Code. If a complaint raised a potential breach of the PP+ Code of Practice, the ASA would, following due process, invite PP+ to consider the complaint before the ASA adjudicated under the relevant BCAP rule:</p>

Annex 2: TV ads for products and services coming within the recognised character of the occult or psychic practices.

Faith, Religion and Equivalent Systems of Belief

Please read the proposed rules for this Code section before responding to the questions below. [To see the proposed rules, please click here.](#)

Background

The law

Communications Act 2003

15.1 The Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for the content of advertisements. The most relevant standards objectives to the Faith section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected

319(2)(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented

15.2 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

European Convention on Human Rights (ECHR)

15.3 The ECHR (implemented in the UK through the Human Rights Act 1998) protects the right to 'freedom of thought, conscience and religion' (Article 9) and the right to 'freedom of expression' (Article 10).

15.4 See the text of the Convention at: www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

Audio-Visual Media Services Directive (AVMSD)

15.5 AVMSD revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

15.6 See the text of the Directive at:

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:01:EN:HTML

Other relevant regulatory bodies

Charity advertisers

15.7 Some advertisers who fall under this section of the Code are charities or, in their advertisements, refer to charities. The Office of the Scottish Charity Regulator (OSCR), the Department for Social Development Northern Ireland and the Charity Commission for England and Wales are therefore relevant regulatory bodies for advertisers that fall under this section. Please see section 16, Charities, for more information on those bodies.

Other

15.8 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk), the RACC, (www.racc.co.uk) and the Institute of Fundraising (IOF)

Meeting the need to ensure that broadcast advertisements for bodies concerned with faith, religion or equivalent systems of belief are socially responsible and have particular regard to the vulnerable.

- 15.9 Broadcast advertisements for bodies concerned with faith, religion or equivalent systems of belief have the potential to harm inter-faith relations and exploit the vulnerable, including the under 18s. The present Codes and the proposed Code adopt the same approach to regulating those advertisements: the rules ensure that advertisements do not exploit the vulnerable, especially the under 18s and those whose circumstances put them in need of particular protection, prohibit advertisements by bodies that might be especially harmful, prevent denigration of other religions and require the identity of the advertiser to be clear.
- 15.10 Some of the rules in the Faith, Religion and Equivalent Systems of Belief section of the present Television Code are more restrictive than in the equivalent section of the present Radio Code. That reflects the reach of television, its place in the family home and its audio-visual impact, which, in combination, can have a powerful impact on individuals, particularly those moral or religious convictions, and on society at large. For example, BCAP's proposed Code maintains the ban on TV advertisements that expound doctrine, unless those advertisements are broadcast on channels whose editorial content is wholly or mainly concerned with matters of religion, faith or equivalent systems of belief ('specialist broadcasters') but allows the expounding of doctrine or beliefs in radio advertisements if it is presented as the advertiser's opinion.
- 15.11 BCAP's rules are intended to strike a balance between the freedom of speech and competing social concerns and objectives.

Advertisements for products related to psychic or occult phenomena

Ofcom consultation on Participation TV

- 15.32 Later this year, Ofcom will consult on the use of premium-rate telephone services (PRS) in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of programmes that are predicated on the use of PRS, including programmes that invite the audience to call to speak to psychics or others who provide services that would be regarded, in the terms of the proposed Code, as 'occult or psychic' services. For the purposes of this consultation, these services are referred to as 'psychic PRS'.
- 15.33 Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. Ofcom might conclude, on a case-by-case basis, that particular content predicated on PRS, including psychic PRS, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code or operate as advertising (teleshopping). Teleshopping must comply with the relevant BCAP Code. At present, the BCAP Television Code bans advertisements for products that rely on belief in psychic or occult phenomena. It exempts three types of product from that prohibition: pre-recorded tarot services, publications that discuss tarot without recommending it and services that readers are likely to regard as entertainment and that offer advice that would obviously apply to large sections of the population (such as newspaper horoscopes).
- 15.34 BCAP sets out below its proposal that the ban and those exemptions to it should be retained. As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal that the present policy on products and services related to psychic or occult phenomena should be maintained is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.

Reviewing TV rule 10.3 and radio rule 3.12 of section 3:

- 15.35 Present TV rule 10.3 states:

The occult, psychic practices and exorcism

With very limited exceptions, advertisements for products or services concerned with (a) the occult or (b) psychic practices are not acceptable

Notes:

1) When appropriate, the ASA and BCAP will make exceptions for specific categories of publications which are of general interest. [Exceptions published 1 November 2002] The ITC defined two categories of advertising which are exempt and which may therefore be advertised:

a) Advertisements for tarot-based prediction services where: the service is pre-recorded and this is explained in the advertising and at the start of the recording and the service is for entertainment only and this is clear from the advertising and is explained at the start of the recording and all references to tarot in the service and the advertising are qualified to make clear that it is not a "real" tarot service (e.g. "tarot-based reading" would be acceptable) and the service does not contain any material which might feel threatening to

callers, or which might harm, offend or distress them

b) Advertisements for books, newspaper or magazine articles and similar paper or electronic publications which refer to or discuss tarot without recommending or promoting it.

2) For these purposes, 'the occult' includes, for example, invocation of spirits, tarot and attempts to contact the dead or demons.

3) Products or services concerned with exorcism may not be advertised since they are concerned with the occult in the sense of being intended to counter it.

4) Psychic practices include astrology, horoscopes, palmistry etc. An exception to part (b) of the rule has been made for the advertising of services (for example, typical newspaper horoscopes) which most viewers are likely to regard simply as entertainment and which offer only generalised comments that would clearly apply to large sections of the population. Such advertising must comply with the rules on misleading advertising in Section 5.

5) Beyond Entertainment is an ITC-commissioned report on research which explored attitudes in this area, including the distinctions the public draw between the occult and psychic issues.

15.36 Present radio rule 3.12 of section 3 states:

3.12 Divination and the Supernatural

Astrological services, along with products and services of a psychic nature, such as clairvoyance, divination, mediumship and psychic exhibitions or fairs, may be advertised but no claims of efficacy can be made or implied. Advertising must conform to the rules in this Code on harm, and scheduling restrictions may apply.

15.37 BCAP considered the policy underpinning the present rules and assessed if, in BCAP's opinion, evidence merited changes to them. BCAP presents here:

- i) The extent to which law and other regulatory bodies regulate products or services relating to psychic or occult phenomena
- ii) the effect of, and policy underpinning, the present rule
- iii) evidence relevant to the review of the present rule
- iv) BCAP's proposal to maintain the present rules and options that BCAP has considered and, on balance, not favoured.

i) The law and other regulatory bodies

15.38 The Communications Act 2003 requires BCAP, through its contracting-out agreement with Ofcom, to ensure that persons under the age of 18 are protected and that the inclusion of advertising which may be misleading, harmful or offensive in TV and radio services is prevented.

15.39 No legislation specific to occult or psychic practices is presently in force. The Fraudulent Mediums Act 1951 was repealed when the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) came into force. The CPRs contain no provisions specific to occult or psychic practices; those practices are subject to the general prohibitions on misleading, aggressive and unfair practices. For more information about the CPRs, see 'Appendix 3: Outline of the effects of the Consumer Protection from Unfair Trading Regulations 2008' to the

proposed Broadcast Advertising Standards Code, which is included in Annex 1 of this consultation document.

- 15.40 When they came into force, many news reports claimed that the CPRs required psychics to include the text 'for entertainment purposes only' or similar in their advertisements. That is not an explicit requirement of the CPRs and, although it might help to render some advertisements compliant, cannot be relied on to bring otherwise unfair advertisements into line with the law or the BCAP Code.
- 15.41 PhonepayPlus (www.phonepayplus.org.uk) regulates services offered in return for payment by premium-rate call charge, including live psychic PRS.
- 15.42 Trading Standards organisations may enforce consumer protection legislation against providers of products or services that relate to psychic or occult practices.

ii) The effect of and policy underpinning the present rules

- 15.43 BCAP has reviewed rule 10.3 of the present Television Code and rule 3.12 (section 3) of the present Radio Code. It has, in that review, been minded to the Communication Act's requirements to ensure that under 18s are protected and advertisements that may be misleading, harmful or offensive are prevented.
- 15.44 As indicated in Part 1 (4) of this consultation document, this review is the first thorough examination of the Television and Radio Advertising Standards Codes since the establishment of Ofcom in 2003 and of BCAP in 2004. In the main, therefore, the policies underlying the rules in the present Codes date back to the previous regulators, specifically the Independent Television Commission and the Radio Authority. In many cases, the historical rationale for those policies is no longer clear. BCAP has therefore had to make some assumptions about the origins of rules and their underlying policies, as indicated in this analysis.
- 15.45 The effect of TV rule 10.3 is to prohibit TV advertisements for products and services that rely on belief in psychic or occult phenomena. TV advertisements for three types of product are explicitly exempted from that prohibition: pre-recorded tarot services, publications that discuss tarot without recommending it and services that readers are likely to regard as entertainment and that offer advice that would obviously apply to large sections of the population (such as newspaper horoscopes).
- 15.46 The Radio Code allows radio advertisements for those products provided no efficacy claims are made.
- 15.47 In both Codes, the rules cover products and services that relate to a wide range of practices including astrology, horoscopes, palmistry, tarot, mysticism, chakra healing, divination, crystals, reading auras, clairaudience and clairvoyance. Those might be offered to the public in a variety of forms from related paraphernalia to publications, from clinics and other establishments to psychic exhibitions or fairs, and by face-to-face or distance-selling means.
- 15.48 The policy underpinning the rules is principally intended to prevent vulnerable members of the audience from being harmed or exploited. Those who are particularly vulnerable to this category of advertising include, for example, children, those suffering ill health, the recently bereaved, those going through divorce or separation, victims of crime and those in financial difficulty. Vulnerable groups could potentially be caused mental, moral or financial harm by broadcast advertisements for those products. Potential harm includes indirect harm caused by discouraging individuals from seeking more suitable professional help, for example mental health counselling, financial planning or medical consultation.
- 15.49 BCAP considers offence is also a relevant factor in the policy underpinning the present TV rule because some products and services relating to psychic or occult practices are, by their nature, offensive to some people and not just those with religious or moral convictions.

15.50 BCAP considers the sector throws up concerns about misleading advertising too; BCAP knows of no adequate evidence for the efficacy of products and services in this category.

15.51 The Television Code bans *advertisers* that provide products or services that rely on belief in psychic or occult phenomena; the Radio Code merely prohibits claims for the efficacy of those practices in *advertisements*. That difference in approach probably takes account of the broad reach of television, its place in the family home and its audio-visual impact, which can, in combination, have a powerful impact on society at large and on individuals, particularly viewers who have an underlying vulnerability to the advertised product. The present TV rule might suggest, therefore, that the power of TV advertising inappropriately validates or otherwise lends weight to a product or service that could cause harm to vulnerable members of the audience, including children. Although radio has a broad reach, that by itself was clearly not considered enough to justify a ban on those advertisers. A ban on claims in radio advertisements for the efficacy of practices that rely on belief in psychic or occult phenomena, and a note to broadcasters to ensure those advertisements are suitably scheduled and comply with the general harm rules, was evidently thought sufficient to deal with the potential for harm or offence.

iii) Evidence relevant to the review of the present rule

15.52 The ITC conducted research in 2001 into public attitudes to occult and psychic practices featured in television programmes and advertisements (see www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf).

15.53 That research was conducted after the present Television Code was drafted but before the emergence of television programmes predicated on the use of psychic PRS. The research found that the audience discriminated between benign psychic practices and other psychic and occult practices that have the potential to harm the vulnerable. The quantitative element of the research found:

‘...viewers were very conservative about the kind of advertisements they considered acceptable on a mainstream channel, such as ITV1. Aside from advertisements for horoscopes along the lines of “What your year holds” in a Sunday tabloid, and advertisements for a pre-recorded horoscope phone line offering daily updated predictions for each star sign, respondents were unhappy to accept other offerings. They were slightly more accepting of psychic and occult advertising on a standard Pay-Television channel, such as Sky One, but not to any great extent. It is clear from this research that the majority of viewers do not want to see such advertising on channels that reach a broad audience ...’¹

15.54 The research concluded:

‘For advertising, television’s greater authority and wider audience than print meant there was greater expectation of regulation of the former, and more latitude for the latter... Concern centred on the apparently unregulated nature of fringe professions, leading to higher expectations of regulation by the broadcasting authority or regulator.’²

15.55 The ITC’s research predated the emergence of television programmes predicated on the use of psychic PRS (‘Psychic TV’). Psychic TV typically consists of broadcasts encouraging viewers to call premium-rate telephone numbers to speak to psychics; some conversations between viewers and psychics are broadcast and some are conducted off-air. This content can appear on channels dedicated to this genre of programming or in “windows” (typically three-hour slots) on other general lifestyle channels. Ofcom might conclude, on a case-by-case basis, that particular content predicated on PRS, including psychic PRS, does not comply with its

1 www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf (p. 47)

2 www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf (p. 52)

Broadcasting Code in its present form or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or whether they could operate as advertising (teleshopping). The latter must comply with the present Television Code and, in time, the proposed BCAP Code. Please see 'Ofcom consultation on Participation TV' ('PTV'), above, for more information.

- 15.56 In July 2007, as part of its consultation on PTV3, Ofcom published 'An independent report on Participation TV – quizzes, adult chat and psychic readings' to help understand how viewers perceive PTV, including Psychic TV, and what their concerns are if any (see www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf). The report stated:

'In the qualitative research respondents claimed that their calls to Psychic channels tended to be infrequent, but bursts of calling could be triggered by specific personal events or "lows". In these circumstances, the frequency of calling could increase considerably. Respondents had been prompted to call TV 'psychics' by events such as family deaths, miscarriages, break-up of relationships or general depression. The qualitative research suggested that viewers' reasons for calling tended to be the need for support, guidance or reassurance ...'⁴

'Some respondents hinted that their judgement, or that of other callers, may sometimes be impaired at the time of participation. Reasons for this perceived vulnerability included insomnia and heavy alcohol consumption before or during viewing. However, when talking to Psychic TV viewers, it became clear that they were particularly concerned about the emotional vulnerability of callers to TV 'psychics'. The 'psychic' is believed to provide guidance or reassurance when callers are depressed or dealing with difficult personal events. While most regular viewers of Psychic TV could happily watch for long periods without feeling compelled to call in, the decision to call in was normally triggered by a specific incident or feeling of depression, hence callers were often in an emotionally fragile state of mind. Some respondents recognised that they have been or could be emotionally vulnerable when calling in. "A while back I lost my mum and dad and I started to feel addicted (to Psychic channels) to try to make some sense of my loss." Female, London. "I spent a hell of a lot of money on it (Psychic Interactive). I was going through a dark patch. I get so down about... (several miscarriages and husband's disability) ... and they were telling me what I wanted to hear, so I'm not sure if it was a waste of money. They were telling me what was going to happen." Female, Sussex'⁵

'A number of respondents claimed that they had experienced very high telephone bills after heavy use of PRS to call... Psychic channels....Since the size of telephone bills was only discussed qualitatively, this research cannot quantify the average monthly bill incurred by callers to PTV channels, nor how many callers are experiencing serious problems. However, the following quotes are typical among those who were willing to discuss their own experiences. "My bill was between £300 and £400 from calling Psychic Interactive..." Female, Sussex, Psychic depth interview'⁶

'A minority of respondents referred directly to being "addicted" to calling... Psychic TV. "Psychic Interactive can be very more-ish. They say something you think is true, but you don't know if it's from something you've told them, so then you have to ring up again, so it's quite addictive for me." Female, Sussex, Psychic depth interview'⁷

- 15.57 Although they are not the only measure of offence or harm, complaints can be an indicator. BCAP noted that radio advertisements for psychic practices have generated no significant complaints. BCAP could not draw on complaints about TV advertisements for those practices because they are largely banned. BCAP noted that, since 2007, Ofcom has received very few

3 <http://www.ofcom.org.uk/consult/condocs/participationtv/>

4 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 7).

5 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 23).

6 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 24).

7 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 25).

complaints about Psychic TV; none of those complaints were found in breach of Ofcom's Broadcasting Code. Those complaints raised concerns about, for example, misleading practices, the giving of life-changing advice and a psychic channel's proximity to a children's channel on the Electronic Programme Guide.

iv) BCAP's proposal to maintain the present rules and options that BCAP has considered and, on balance, not favoured.

15.58 BCAP weighed up, on the one hand, the desire of some audience members to see advertisements for products or services relating to the occult or psychic practices and, on the other, the need to protect the vulnerable from potentially harmful material and material that could cause serious or widespread offence. BCAP considered that, although it possibly did not envisage long-form television advertisements for products and services that rely on belief in psychic or occult phenomena, the policy underpinning the present TV rule is as relevant to those advertisements as to TV spot advertisements for those products and services. BCAP took account of the fact that radio advertisements for those products and services have been allowed, albeit without efficacy claims, since 2000 and have generated no complaints. It considers the radio rule has been effective and proposes to maintain it. BCAP considers, however, that TV's broad reach, its place in the family home and its audio-visual impact can, in combination, have a powerful impact on society at large and on individuals. It considers the impact of TV advertisements for those products and services on viewers who have an underlying vulnerability to the advertised product is likely to be much greater than the impact of radio advertisements on listeners with the same underlying vulnerability. BCAP therefore proposes to maintain the present TV rule.

15.59 BCAP's principle consideration is to protect the audience from harm, most obviously to protect the vulnerable from exploitation. To secure that protection, the Communications Act 2003 provides that the Code (under the contracting-out agreement with Ofcom):

321(1)(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

15.60 In reaching its proposal for TV advertisements for products or services relating to psychic or occult practices, BCAP considered three broad approaches:

1) maintain the prohibition on advertisements for products and services relating to the psychic or occult with the present exceptions;

2) maintain the prohibition on advertisements for products and services relating to the psychic or occult but add a category of exempted products: premium-rate telephone services operating with prior permission from PhonepayPlus;

3) maintain an explicit prohibition on advertisements for occult products; allow advertisements for psychic products in principle but draft rules designed to prevent the most harmful psychic products from being advertised, and limit the claims that can be made for the products that can be advertised.

15.61 Under option 2, BCAP considered adding a category of exempted products: those that operate under prior permission from PhonepayPlus. All live PRS providers in this category must obtain prior permission to operate from PhonepayPlus and must

- give call cost and service provider information at the start of the call,

- discourage users from giving out information about their surname, place of work, address, geographic telephone numbers or from arranging meetings,

- user reasonable endeavours to prevent people under 18 from taking part

- end calls if they have reasonable grounds, after questioning a user, to suspect the user is under 18 and

- take reasonable steps to identify and cut off calls made without the bill payer's permission.

- 15.62 BCAP acknowledged that those rules could limit the potential harm to children that might otherwise be caused by such services and, to an extent, protect adult consumers from being misled. It noted, however, that PhonepayPlus's rules neither restrict the content that might be offered on those services nor protect adult callers from exploitation, for example through predictions of negative events that encouraged users to make repeated calls or by offering advice that might cause consumers to take life-changing decisions, including decisions affecting their finances or health. The protection provided by PhonepayPlus does not alleviate BCAP's concern that such services might exploit the vulnerable. BCAP considered that advertisements for those services did not therefore warrant an exemption from the general ban on advertisements for products and services relating to the psychic or occult.
- 15.63 BCAP noted many operators presently offering editorial psychic interactive TV services have adopted voluntary guidelines, which their psychics are advised to adhere to, to protect the vulnerable. Those guidelines compliment Ofcom's requirement that demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these whether such demonstrations purport to be real or are for entertainments purposes) must not give life-changing advice directed at individuals⁸. BCAP was concerned, however, that those voluntary guidelines do not go far enough to prevent the exploitation of the vulnerable and that new entrants to the market might choose to disregard voluntary standards.
- 15.64 Under option 3, BCAP considered maintaining the explicit ban on TV advertisements for products and services relating to the occult but allowing, in principle, advertisements for products and services relating to psychic practices, the latter being subject to rules designed to prevent advertisements for psychic products that have the potential to be harmful. BCAP considered, however, that that could lead to uncertainty about which advertisers are acceptable and which are not. Although those rules would ensure the content of advertisements would be responsible, by limiting the claims that can be made for the products that can be advertised, they would not necessarily preclude types of advertisers that might exploit the vulnerable. Again, that consideration takes into account the impact of TV on viewers who have an underlying vulnerability to the advertised product. BCAP considered the present TV rule is clear because it exempts advertisements for distinct types of products or services. BCAP did not consider it had the evidence to justify exempting other psychic practices from the ban on TV advertisements for products and services that rely on belief in psychic or occult phenomena
- 15.65 On the balance of evidence, BCAP proposes to maintain the present TV and radio policy in proposed rules 15.4 and 15.5:

15.4

Television and television text advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include astrology, personalised horoscopes, palmistry, fortune-telling, tarot, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

15.5 – Television and television text only

Television and television text advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a

the service includes no content that respondents might feel to be threatening and

15.5.1.b

both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

Question 97

Given BCAP’s policy consideration, do you agree to maintain the existing TV and radio requirements on advertisements for products or services concerned with the occult or psychic practices? If your answer is no, please explain why.

Other questions**Question 98**

i) Taking into account BCAP’s policy consideration, do you agree that BCAP’s rules on Faith, Religion and Equivalent Systems of Belief are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

BCAP'S EVALUATION OF SIGNIFICANT RESPONSES

Question 97: Given BCAP's policy consideration, do you agree to maintain the existing TV and radio requirements on advertisements for products or services concerned with the occult or psychic practices? If your answer is no, please explain why.

<i>Responses received in favour of BCAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
<i>Church Society An individual Kenneth Williams</i>		
<i>British Humanist Association</i>	<i>Supports maintenance of ban; if the ban is relaxed, BHA would be happy with alternative rules permitting the advertising of such services only if their efficacy has been proven in double blind trials or services promoted for entertainment only.</i>	
<i>Responses received against BCAP's proposal:</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
<i>3C Ltd AIME An organisation</i>	<i>Psychic PTV services attract relatively low levels of complaint</i>	<i>The absence of complaints does not necessarily mean that the advertising is not exploitative: the consideration of exploitation of the vulnerable is a qualitative, not a quantitative, matter.</i>
<i>3C Ltd Adalsys An organisation</i>	<i>Ofcom's decision whether existing Psychic PTV content should be classified as editorial or advertising will have a significant impact on the effect of this</i>	<i>Ofcom has now concluded its consultation and amended the Broadcasting Code, with the effect that much of the content previously regulated by</i>

<p> <i>Mobile Media Production Ltd An organisation An organisation PTVBA Square 1 Communications Laura Allison Nina Ashby Honor Broxap Jemma Buckley Carolyne Faulkner Colin Ronald Fenton Susan Jayne Fenton Debbie Gallagher An individual John Healy Adam Leonard An individual Stuart Mills An individual Elaine O'Neill Charlotte Partlow Anne Scholes Adele Vellacott An individual</i> </p>	<p> <i>rule; the rule should be reconsidered once the outcome of Ofcom's consultation is known.</i> </p>	<p> <i>Ofcom under the Broadcasting Code will now fall under the BCAP Advertising Standards Code.</i> </p> <p> <i>BCAP considers, however, that television advertisements for psychic or occult products and services are likely to exploit the vulnerable, whether they are offered in long or short form. It notes the existing ban, like all other rules in the Code, applies to teleshopping as well as spot advertising, and the potential increase in the volume of teleshopping content, if the rule were to be relaxed, does not affect BCAP's view that the promotion of psychic and occult products on television is likely to exploit the vulnerable.</i> </p>
<p> <i>AIME An organisation</i> </p>	<p> <i>Psychic services offered through premium rate telephone numbers are already regulated by PhonepayPlus</i> </p>	<p> <i>That PhonepayPlus regulate such services does not preclude BCAP rules: the BCAP Code contains a number of rules that are specific to, or</i> </p>

		<i>could apply to, the promotion of premium rate services, in addition to the PhonepayPlus Code. That BCAP is the proper body to maintain rules on broadcast advertising in all sectors, regardless of the existence of sector-specific regulators for some products, is well established.</i>
<i>Adalsys An organisation Mobile Media Production Ltd An organisation</i>	<i>BCAP is attempting to reclassify psychic participation TV as teleshopping</i>	<i>It is Ofcom, not BCAP, that determines how much commercial content is permitted in editorial time and what is permitted only in teleshopping; BCAP's proposals do not relate to "reclassification".</i>
<i>Adalsys An organisation Mobile Media Production Ltd An organisation</i>	<i>The maintenance of the ban on advertisements for psychic and occult products and services will have a devastating economic impact on providers of psychic PTV.</i>	<i>BCAP acknowledges the economic impact but considers that the preservation of this revenue stream for providers of such services does not justify the exploitation of vulnerable viewers.</i>
<i>AIME Fusion Telecom</i>	<i>Providing information about the nature of the service and the cost of calling a premium-rate number ensures that consumers are able to make an informed choice about whether to call.</i>	<i>BCAP considers that the potential harm that psychic and occult products may cause to consumers goes beyond economic harm. Whilst it considers the provision of factual information about the nature of advertised products and their price to be important safeguards, it considers that that alone is not enough to prevent vulnerable viewers from exploitation.</i>
<i>AIME Oxygen8 Peripatos Square 1 Communications</i>	<i>Psychic PTV is popular with viewers</i>	<i>That a product or service is popular does not necessarily mean that it is suitable for promotion on television</i>
<i>AIME</i>	<i>Psychic services products and services are widely</i>	<i>BCAP considers that the power, impact and</i>

<i>An organisation</i>	<i>promoted in other media</i>	<i>untargeted nature of television advertising means it is more likely to have an adverse effect on the vulnerable than advertising in other media, which justifies differences in the rules for different media.</i>
<i>AIME An organisation Fusion Oxygen8 Peripatos</i>	<i>The reference in the rule to “occult and psychic practices” misleadingly and offensively implies psychic practices are occult: that they are mysterious and threatening</i>	<i>The use of both “occult” and “psychic” is intended to recognise the two as separate categories</i>
<i>An organisation</i>	<i>Public interest in and media coverage of psychic phenomena is increasing</i>	<i>The increase in documentary and fictional television involving psychic phenomena does not make charging for the provision of psychic services any less likely to exploit the vulnerable.</i>
<i>An organisation</i>	<i>Service providers are obliged under the PhonepayPlus Code to establish procedures to prevent under-18s from accessing psychic PRS, and many service providers maintain additional measures as a matter of best practice</i>	<i>Also the under-18s are one vulnerable group that should properly be protected, BCAP is concerned also about the potential exploitation of vulnerable adults, for example, the recently bereaved, those suffering serious illness, and the mentally infirm.</i>
<i>An organisation</i>	<i>The content of psychic consultations promoted on psychic PTV is equivalent to the content of the generic horoscopes that may be advertised</i>	<i>BCAP considers that the provision of one-to-one advice is substantially different from the provision of generic or pre-recorded advice that clearly applies to the wide section of the population.</i>
<i>Laura Allison Nina Ashby Honor Broxap Jemma Buckley Carolyne Faulkner Colin Ronald Fenton Susan Jayne Fenton Debbie Gallagher An individual</i>	<i>Ofcom research found that many viewers of psychic PTV regarded it as uplifting, informative, trustworthy and supportive.</i>	<i>BCAP acknowledges that viewers of such services regard them as benign and positive. It is concerned, however, about the potential for emotionally vulnerable viewers to become dependent on such services, to their emotional and economic detriment.</i>

<p><i>John Healy</i> <i>Adam Leonard</i> <i>An individual</i> <i>Stuart Mills</i> <i>An individual</i> <i>Elaine O'Neill</i> <i>Charlotte Partlow</i> <i>Anne Scholes</i> <i>Adele Vellacott</i> <i>An individual</i></p>		
<p><i>Square 1</i> <i>Communications</i></p>	<p><i>BCAP has acted improperly in considering the content of psychic premium-rate services, which are outside its remit</i></p>	<p><i>BCAP considers that the nature of a product is intrinsic to considerations of its suitability for promotion on television: although BCAP does not regulate the content of the service, it quite properly takes account of the nature and potential effects of products and services when it determines whether to restrict advertising for them.</i></p>

Annex 3: Broadcast ads for or that include competitions.

Competitions

Please read the proposed rules for this Code section before responding to the questions below. To see the proposed rules, please click [here](#).

Background

The law

Gambling Act 2005

- 28.1 The Gambling Act 2005 came into force on 1 September 2007. It controls all forms of gambling in England, Wales and Scotland, including gambling over the Internet.
- 28.2 The Gambling Act 2005 contains provisions in section 14, titled Lottery, and Schedule 2, titled Lotteries: Definition of payment to enter, that are relevant to this section.
- 28.3 Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1419110
- 28.4 Please note the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (as amended) continues to cover those activities in Northern Ireland.
- 28.5 Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2912211

Other relevant regulatory bodies

The Gambling Commission

- 28.6 The Gambling Commission was set up under the Gambling Act 2005 and was formally established in October 2005. It regulates casinos, bingo, gaming machines and lotteries and also has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people from being harmed or exploited by gambling.
- 28.7 Please see: www.gamblingcommission.gov.uk/Client/index.asp

PhonepayPlus (PP+)

- 28.8 PP+ regulates PRS under a co-regulatory agreement with Ofcom, which retains its legal powers in regard to PRS that stem from the Communications Act 2003. PP+ carries out its duties so that consumers, particularly children who might be especially vulnerable, can use PRS with absolute confidence. PP+'s Code of Practice sets standards for the promotion, content and overall operation of PRS. The Code of Practice is approved by Ofcom under section 121 of the Communications Act 2003. PP+ investigates complaints and has the power to fine companies, bar access to services and order refunds. PP+ can also bar the individual person behind a company from running any premium-rate service under any company name on any telephone network for a set period. PP+'s website, which includes its Code of Practice, is www.phonepayplus.org.uk.

Meeting the need to regulate competitions in broadcast advertisements

- 28.9 Competitions in broadcast advertisements have the potential to mislead members of the audience and cause them financial harm.
- 28.10 At present, broadcast advertisements for competitions are subject to the Codes' general rules that ensure advertisements do not mislead, harm or offend and the privacy of the individual (a competition entrant, for example) is protected. Competitions that invite entry via a premium-rate payment mechanism must comply with rules in the Premium-Rate Services sections of the existing Codes. The present Radio Code includes an additional requirement; a radio broadcaster must be satisfied that prospective entrants to a competition can obtain printed details of a competition, including announcement of results and distribution of prizes.

Ofcom consultation on Participation TV

- 28.11 Ofcom will later this year consult on the use of premium-rate services (PRS) in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of programmes that are predicated on the use of PRS, including Quiz TV. Quiz TV services form a genre of TV programme, which normally features a presenter inviting the viewing audience to solve on-screen competitions (including quizzes, puzzles, etc). Viewers generally pay the cost of a premium-rate text message or premium-rate telephone call for a chance to solve the quiz and win prize-money; sometimes a caller's identity and spoken answer is broadcast. A free-entry route is offered to the audience if it is necessary for the purposes of complying with the Gambling Act 2005.
- 28.12 Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. It is possible that Ofcom may conclude, on a case-by-case basis, that particular content predicated on PRS, including Quiz TV, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters might then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or to consider whether they could operate as advertising (teleshopping). The latter must comply with the present BCAP Television Code and, in time, the proposed BCAP Code. At present, The BCAP Television Code regulates competitions in advertisements through its general rules, especially rules that prevent misleading advertisements.
- 28.13 As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal is to introduce a new rule ensuring competitions are conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known, which BCAP intends to support with a guidance note that assists broadcasters to comply with that rule. That proposal, however, is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.

Proposed substantive changes

New rule

Competitions

28.14 The present Radio Code states:

Section 2, rule 26 Competitions ...

Advertisements inviting listeners to take part in competitions are acceptable, subject to Section 14 and Schedule 2 of the Gambling Act 2005.

Licensees must be satisfied that prospective entrants can obtain printed details of a competition, including announcement of results and distribution of prizes. There are no limitations on prize values.

Please see also Section 2 Rule 11.8 and Section 3 Rules 4.28 and 11.5

- 28.15 That rule merely informs radio broadcasters that advertisements inviting listeners to take part in competitions should take into account rules on the protection of privacy and exploitation of the individual, rules that safeguard children (including restrictions on the content and type of advertisements for competitions directed at children) and rules on promotions in medicine and alcohol advertisements. The Note to the rule requires a radio broadcaster to be satisfied that prospective entrants can obtain printed details of a competition, including announcement of results and distribution of prizes. That information might go some way to satisfying a prospective entrant that the administration of the competition is fair.
- 28.16 Beyond those rules, the BCAP Codes do not include dedicated rules on the administration of competitions or any other type of promotions that feature in advertisements. Because spot advertisements are typically short in duration, promotions included in them tend to be simple, for example two-for-one offers, 25% off, 10% more and the like. BCAP considers its Misleading rules adequately regulate those promotions, especially the existing rules that prevents advertisements from misleading by omission of significant conditions. BCAP has no evidence that the audience or broadcasters have been disadvantaged by the lack of specific rules on promotions and it does not propose to include new rules for advertised promotions in general.
- 28.17 Broadcast advertisements that invite viewers or listeners to take part in competitions are, at present, few and far between. BCAP is mindful, however, of the potential for competitions, quizzes and the like to feature in long-form broadcast advertising, particularly television advertising in the light of Ofcom's consultation on PTV.
- 28.18 BCAP has considered if the existing rules are adequate to regulate competitions in broadcast advertisements given the widely reported and serious compliance failures in programmes that encourage viewer participation through premium-rate payment mechanisms, much of which concerned competitions in TV and radio programmes, including Call TV quiz services. That led to Ofcom commissioning an inquiry in March 20071, which concluded that systemic problems were evident in TV broadcasters' use of PRS.
- 28.19 In the light of that inquiry, Ofcom published Guidance2 to assist compliance with rule 2.11 of its Broadcasting Code, which states: 'Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.' The Guidance applied to all broadcast competitions in television and radio programmes and not just Quiz TV services. It made clear that 'Ofcom expects all competitions to be run fairly and honestly. Broadcasters who run them are inviting viewers and listeners to take part in schemes on terms that would be assumed to be equitable and free of deception: everyone who takes part should have the same chances of winning and all aspects of a competition should be clear and fair.' The Guidance reminds broadcasters of their compliance obligations in general and sets out detailed guidance on the operation of a competition and the procedure for choosing a winner. It includes guidance on pricing, free entry routes, despatch, availability and substitution of prizes, competition rules, solutions and methodology.

1 www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf

2 www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance2.pdf

28.20 BCAP proposes to include a dedicated rule on competitions because it would bring to broadcasters' attention the importance of ensuring that conditions of competitions are made clear and the administration of those are fair. It therefore proposes to reproduce in the new BCAP Code Ofcom's rule on competitions with the intention of providing continuity in regulation and protection for broadcasters and the public alike. BCAP intends to supplement that rule with Guidance, which is likely to cover the same ground as Ofcom's Guidance. BCAP intends that the Guidance will be published at the same time as the new BCAP Code. The proposed rule and guidance would complement rules in the Misleading section of the BCAP Code and replace the existing radio rule, rule 26 in section 2, which deals with Competitions.

28.21 BCAP's proposed TV and radio rule is:

28.1

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.

Question 141

i) Given BCAP's policy consideration, do you agree that rule 28.1 should be included in BCAP's new Code? If your answer is no, please explain why?

ii) Do you have other comments on this section?

BCAP's evaluation of significant

Question 141:

i) Given BCAP's policy consideration, do you agree that rule 28.1:

“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and made known”
should be included in BCAP's new Code? If your answer is no, please explain why?

ii) Do you have other comments on this section?

Responses received in favour of BCAP's proposal from:

The Advertising Association; AIME; a company; a company; a company; Charity Law Association; E.ON Energy Limited; Institute of Practitioners in Advertising; Kraft Foods UK and Ireland; Square 1 Communications Ltd; a TV broadcaster

Summaries of significant points:

These respondents supported BCAP's proposal.

The Advertising Association asked BCAP to consider replacing “clear and made known” with “clear and **appropriately** made known”

AIME agreed and added that competitions should comply with the PhonePayPlus Code of Practice.

BCAP's evaluation of those points and action points:

BCAP welcomes the respondents' support of its proposal.

BCAP considers it is not necessary to add “appropriately”.

If advertisements that include competitions are operated through a premium-rate payment mechanism, the ad must comply with:

22.1

	<p>-----</p> <p>A company said for competition operators who are potentially subject to reclassification as Teleshopping (e.g. quiz TV), a direct reflection of Ofcom's rules and guidance in this area should ensure simple continuity for the business and its content output.</p> <p>-----</p> <p>Charity Law Association agreed but asked BCAP to consider an explicit cross-reference to the Gambling Act 2005; otherwise the rule is potentially too vague.</p>	<p>Advertisements that include a premium-rate telephone number must comply with the PhonepayPlus Code of Practice.</p> <p>-----</p> <p>BCAP welcomes the respondent's support of its proposal.</p> <p>-----</p> <p>BCAP's consultation document states: "(BCAP) therefore proposes to reproduce in the new BCAP Code Ofcom's rule on competitions with the intention of providing continuity in regulation and protection for broadcasters and the public alike. BCAP intends to supplement that rule with Guidance, which is likely to cover the same ground as Ofcom's Guidance. BCAP intends that the Guidance will be published at the same time as the new BCAP Code." Ofcom's Guidance presently makes reference to the Gambling Act 2005 and it is envisaged that BCAP's guidance may do so too.</p>
<i>Responses received against BCAP's</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>

<i>proposal:</i>	Not one respondent objected to BCAP's proposal.	
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