

# **Participation TV Regulatory Statement and Further Consultation.**



## **Response to consultation by the Premium Rate Association for and on behalf of its members.**

**January 2010**

### *Introduction*

The Premium Rate Association thanks Ofcom for this opportunity to add comment to this consultation piece.

As a non profit, membership driven, trade organisation operating in the Premium Rate telephony sector. Our members understand the need for balanced regulation to instil public trust in the premium rate billing mechanism and we supported all relevant and appropriate industry agreed regulation in this arena.

The Association is keen to reiterate the findings of previous studies into the PTV market which have made it very clear that today's broadcast consumer enjoys the ability to interact with the programming they offer. Premium Rate Telephony is a fantastic method of facilitating this type of interaction and with participation supplementing the broadcaster's abilities to communicate with their audience and offering vital new revenue opportunities.

We recognise that Ofcom as it is duty bound has now performed consumer research although we would question the adequacy of results from such a low number of participants (222), we would also question whether this fulfils their statutory obligation as the 1990 Broadcast Act defines research should be from those that actually watch the programme(s) and your basis is made up from only a tiny % of actual viewers.

## Section 12 Broadcast Act 1990:-

### “Audience research

(1) The Commission shall make arrangements—

(a) for ascertaining—

(i) the state of public opinion concerning programmes included in licensed services, and

(ii) any effects of such programmes on the attitudes or behaviour of persons who watch them; and

(b) for the purpose of assisting them to perform their functions under Chapter II in connection with the programmes to be included in the various services licensed thereunder, for ascertaining the types of programme that members of the public would like to be included in licensed services.

Despite this we note with interest some of the comments made by the general public via the qualitative research which Ofcom commissioned on behalf of the industry, such as:-

“it was felt that the choice to call a PTV service was, and should remain, the individual’s decision, and that therefore the opportunity to do so should remain”

We note the comments of the lady whose 21 year old son watched sexcetera, which is on terrestrial TV, and which she felt was damaging. This is a non PTV channel and concern is expressed by the respondents generally about language and content on main stream terrestrial channels.

We feel parental control and using the ability to switchover, turnoff and not to place TV’s in children’s rooms allows the UK populace to self police its children’s watching habits, as much as the industry ensuring that editorial and advertising is suitable and appropriately offered to the potential viewer.

It is noted that respondents did not want a “nanny state” and felt that “freedom of choice” was important.

With the repeal of the Mediums Act and various changes in the English church and developments within society since the 1950’s when this act was conceived, is it not now time to have an adult debate on the definitions in relation to what are “physic services”. The non relaxation of the Occult seems misplaced -The word **occult** comes from the Latin word *occultus* (clandestine, hidden, secret), referring to "knowledge of the hidden".. Please note the Broadcast Code section 1.19 allows the airing of programmes including occult practises and exorcism and the para normal after the watershed. There are many TV programmes which are popular with viewers such as Sally Morgan on ITV.

It is time to look at all definitions and indeed all of the codes relating to TV i.e. the Broadcast Code, BCAP, ASA and Phone pay plus.

The definition of PRS as a product or service appears inaccurate as in reality it is a billing mechanism. This mechanism may deliver a product or service and, if as regulation currently states editorial must not have products or services offered in it, it would therefore suggest you would not be able to offer PRS in any TV show in the UK if the strict spirit of law was followed. Clearly this is not in the public interest and we would hope that Ofcom would not support this, certainly in light that it is a critical tool for mainstream TV to make revenue.

We are deeply concerned with your suggestion of limiting of payment only to PRS. This seems against principles of EU directives to allow flexibility and transparency to consumers and may limit future developments in terms of the telephony and broadcast industry. How can Ofcom support not only enforcing that on a free view platform that you may not offer PTV but also that the only billing mechanism allowed is to be PRS. Your argument for not allowing freeview is that there are not parental locks (which is technologically and factual incorrect) but with credit cards you have to be over 18 to get the ability to pay in such a manner so your position seems a dichotomy. What is Ofcom really seeking to achieve?

We could argue that it is censorship derived from within Ofcom itself. As a real example Mary Whitehouse was one individual on a crusade, and that is the perception of the industry in regard to Ofcom's motivation. Media watch was formed out of her efforts, even they state on their website in response to Ofcom's last consultation:-

"Vivienne Pattison, the new director of **Mediawatch UK** said this would be a simple change which would ensure children are properly protected. Miss Pattison accused broadcasters of paying "lip-service" to the need to protect children.

*"The technology has moved ahead of the regulation and that's the problem. Ofcom's most recent research found that fewer than a third of parents use parental controls or are confident about how to use them. And often it's children of parents who cannot or will not do something about it who are the ones you are most concerned about."*

Surely the only way to secure that those under 18's are protected is by their parents or guardians restricting their viewing material. As an industry how could it be in our interests to have those watching that the programming is not aimed at? The education of parents and guardian's regarding parental controls should fall within Ofcom's and the government's remit.

"With regard to 'rules relating to offensive language' it is evident that the existing rules simply do not work. It is not enough to say that 'the most offensive language must not be broadcast before the watershed' if there is no definition of 'the most offensive language'. "

Nor would the PRA argue is their any definition of what is offensive per sa what offends you may not offend another.

We would question whether there are clear enough definitions of editorial, teleshopping, psychic, adult and the word offensive in relation to broadcast.

There is no demonstrable consumer harm and there is no legitimate evidence of any consumer complaints. Seeking to define what is editorial and what is advertising is highly complex and potentially a Pandora's Box. A judge recently said of Jeremy Kyle that his show was bear baiting, this show gets a percentage of revenue from PRS, is this then a form of editorial that provides entertainment to some just as PTV does? His show's content ranges from topics including sexual matters through to crime and drug abuse yet is aired in the day time, even on his website some of the subject matter has guidance notices on them. This show is aired on week days at 9.20am on ITV1, and is then repeated at 2.30am.

You want to reposition the adult and psychic elements of PTV into the teleshopping category, surely all shows which have any call to action and other similar shows must also move, but do these services really fall into this category? Below are various definitions; in fact your definition would make various programmes which you view as editorial teleshopping, The Concise English Oxford's Dictionary's definition for editorial is "commentary with a writer or programmer's opinion stated". In PTV then the non participant viewer would in their case then confirm these shows to be editorial. In the case of adult and psychic PTV Ofcom's own research showed that viewers found these programmes both "entertaining and engaging" and therefore editorial in nature.

Whilst in your document:-

A5.27 'Television advertising' is defined under the AVMS Directive as:  
"any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment"

A5.28 'Teleshopping' is defined as:  
"direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment"

**tel-e-shop**  (tɛl ɪˈʃɒp)

*intr.v.* **tel-e-shopped, tel-e-shop-ping, tel-e-shops**

To buy consumer products over the Internet or by way of television using a telephone connection or an interactive cable.

[tele(vision) and tele(phone) + shop.]

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**tel e-shop per n.**

# teleshopping

NOUN THE PRACTICE OF SELLING GOODS THROUGH SPECIAL TELEVISION PROGRAMMES

MONASH Marketing  
Dictionary

## Teleshopping

a form of non-store or in-home retailing in which the consumer can purchase goods and services shown on television; the purchaser telephones an order, or orders with the aid of a computer, and the products are delivered to the home. See Home Shopping; Non-Store Retailing.

It seems to us, and we note the English concise dictionary does not contain a definition of teleshopping, for Ofcom to re-class these channels as teleshopping is very subjective and not a view that the industry supports. PTV provides a service via a billing mechanism whether PRS or credit card which is for the over 18's. We note you can not have a fixed telephone line until you are 18 and with mobile phones sold to children on contract we would argue, as do Mediawatch, that parental control takes precedence, as well as the age restrictions on content imposed by the mobile operators.

We performed some research into what consumers felt teleshopping meant without exception it was payment via the TV or Radio or Internet for the delivery of a tangible product.

It could be argued that Big Brother, I Am Celebrity Get Me Out Of Here, Deal or No Deal, Dickson Real Deal, Cash in The Attic, Dancing On Ice, X Factor, and GMTV etc which rely on PRS could be classed as teleshopping. Indeed the participants promote on air the PRS, in the case of I'm Celebrity Get Me Out Of Here the celebrity with pleas to the public and quotes of their Premium Rate number as to whether they should stay or go along with their number printed on their T-Shirts which is on screen the whole show. Is this advertising as defined above and should it be allowed or be reclassified? In fact what defines what is editorial or teleshopping is what society perceives it to be, most consumers would say teleshopping is where you can physically purchase a good or a service which is delivered to you in a tangible form i.e. a toaster or an insurance policy.

You say cases will be looked at individually but reality we do not believe any more than MediaWatch that the terrestrial channels will have any cases looked at. It was only due to PPP involvement and consumer outcry that GMTV and ITV were fined by Ofcom. The regulations were already in place it was just not enforced. Your consultations originally had issue with Quiz TV we note that all large terrestrial channels are re running such content. The viewers will not know that these have been reclassified nor will they care we would argue, they merely want not to be misled as to what they will receive. We believe that adequate regulation was and is in place and therefore re-classification served no purpose just as it will not with adult and psychic services. We believe it is time to consolidate the rules books and look at industry co or self regulation.

ICSTIS (now called PhonepayPlus) originally came about because there was not sufficient and appropriate regulation of the PRS industry. We believe it is time to look at having an industry body regulating this market space.

Both Adult and physic PTV channels are in our opinion airing editorial based programming, and they should remain subject to the current Broadcast Code, however should Ofcom force reclassification of these channels to teleshopping then these companies would fall currently under the BCAP code as advertising. We agree that the BCAP code is outdated in relation to the regulation of PRS. BCAP themselves have publicly said that they do not believe that they are best placed to regulate this type of TV.

This would appear to reinforce our view that regulation of this market space is confused and needs a review with a mind to a co/self regulatory regime.

We also recognise there is confusion as to who does what in the value chain i.e. the ASA, BCAP, PPP and Ofcom along with all the various pieces of legislation surrounding broadcast such as the 1990, 1996 Broadcasting Acts along with the 2003 Communications Act and other various relating legislation. We believe that clarity is required and an another body should govern programmes that use PRS an alternative billing mechanism within them.

### **Question 1:**

- a) Do you agree with Ofcom's assessment of those stakeholders likely to be affected by changes to the regulatory framework for Adult Chat and Psychic PTV services?

Yes we agree broadly with your assessment of the stakeholders who will be affected by your proposed changes, but would add those employees of the companies involved in the value chain who may lose their jobs due to decreased venues in this market space, if your proposals are accepted.

The PRA would question the motivation behind your proposed changes. By your own admission there is little or no consumer harm, the industry turnover is by your consultants – Mediatique's assessment worth £20million and by the industries unsubstantiated assessment £80 million. Even in the light of changes to EU directives, via case law what are the benefits of reclassification? In fact we would argue potentially you will push this type of broadcasting/programming off shore.

- b) do you agree with our understanding of the industry and operators?

Broadly yes, although anyone with an outpayment of £1.04ppm on a £1.50ppm in the industry as a Service Provider does not have a large volume of traffic, it would be helpful to know who quoted you these figures. However, you also fail in your value chain to account for the number of people employed in these activities. Ranging from designers, production, design, graphics, sound, script and phone operators etc. As mentioned this is about freedom of choice we would argue that to stop promotion via free view and to re classify is to begin to start censorship, PTV could then call for the banning of programming content of Sexextra etc. What benefit is served and where does this stop?

### **Question 2**

Do you agree with our analysis of the options available for regulation of the promotion of premium rate services of a sexual nature, and

- a) that on the basis of options, a change to the existing rules appear merited?
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?
- c) that the scheduling restrictions of 9pm to 5:30am and requirements for labelling and EPG position under Option 4 offer appropriate protection for viewers?

Whilst we understand Ofcom's desire to protect consumers we can see no merit in the proposed changes as there is little or no consumers harm and of the 222 people consulted – no one says change the rules or limit access in fact the reverse appears to be the case. Your proposals may drive operation abroad outside your control and will affect the livelihoods of people providing content that is clearly required, as shown by the viewing and revenue generation via PRS and other payment mechanisms.

There is an argument that these channels do provide editorial content (definition of which via Oxford Concise Dictionary) "relating to the commissioning or preparing of material for publication" and therefore are NOT advertising or teleshopping.

We believe that the status quo should be continued, and that you have not demonstrated that any changes are required or would benefit the viewer or the industry.

We believe that the use of EPG positioning is platform dependent therefore whilst Sky for instance position adult in the top end in 900, freeview restrict by labelling, the industry restrict by programme restriction and time slots . The real and ultimate responsibility for programme restriction must be the parent or guardian located in the home. Reclassification will not stop minors viewing content which may not be suitable for them.

**Question 3:**

Do you agree with our analysis of the options available for regulation of the promotion of live personal psychic services, and

- a) on the basis of the options, that a change to the existing rules appears merited?
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?
- c) that the restriction to specific live personal psychic services and the requirements for labelling and EPG position provide appropriate protection for viewers?

Please see above as there appears to be no demonstration of consumer harm what so ever we believe that the status quo should remain. In fact with regulation by PhonepayPlus

your own agency the operation of PRS is more than regulated. The absence of consumer complainants would support the relaxation of rules rather than further restrictions.

We would argue that for both types of content, adult and psychic, that options 1 and 3 involve either encryption or large financial cost and your suggestion in option 4 of teleshopping would dramatically affect these types of services and their operation. Why can the status quo not be maintained, we do not believe Ofcom has put forward a cohesive argument for change.

#### **Question 4:**

- a) Do you agree with the principles identified for changes to the Advertising Code rules on promotion of PRS of a sexual nature (rule 11.1.2) and psychic practices (rule 15.5)

Clearly the BCAP code in relation to adult as below is outdated and we agree should be updated and clearly are unworkable in its current format as below and clearly is not being enforced.

#### **“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”

We are unable to agree as we could not find a 15.5 to amend. Did you mean section 10.3? If so we agree this should be amended with industry consultation and would suggest that PPP or a new industry co or self regulatory body should be formed.

#### **10.3 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:*

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*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.*

#### **10.4 Superstition**

No advertisement may exploit the superstitious

If this is the section you seek to replace with 15.5 then we refer you to our answer in b and also state there is urgent need to debate terminology. It also demonstrates how confusing your consultation document is. I have never had so many calls or correspondence from members as I have with this document, the industry is totally confused as to your motivation, terminology, which code or law takes precedent and indeed what you ultimately want to achieve.

On a personal note and I have been responding and writing to consultative documents for over 15 years I found the layout and terminology unhelpful.

- b) Do you agree with the wording of the proposed rules? If not, please suggests alternative wording.

Our proposed wording for both sections would be “Those broadcast organisations that work within the premium rate market space will be regulated by PhonepayPlus or an appropriate authority as agreed after industry consultation”.

#### **Conclusion**

We are concerned that no adequate definition of editorial content exists, leaving this proposed paragraph open to an unacceptable level of personal interpretation. We do not believe that any definition should be based solely on the commercial intent; it should be determined on the entertainment value viewers attach to the programming. The determination of the entertainment factor rests ultimately with the viewer and their ability to change the channel, based upon full and transparent information on what they expect to receive and will receive. Editorial content is therefore self-policing, as broadcaster will not continue to air shows with insufficient viewing figures, or response levels.

What may be satisfying editorial content to one person may well not be to another, as such, editorial content is subjective.

The PRA is in agreement with Richard Ayre's statements that "Broadcasters offering PRS have a set of obligations to individual customers which go beyond their traditional responsibilities" and that "further regulatory intervention must be centred upon securing the broadcaster's delivery of its obligations". For this reason our understanding of the role and influence the broadcaster has over the structure and delivery of the PRS within the PTV arena. We believe it is the responsibility for regulatory compliance which must lie primarily with the broadcaster, who must wisely monitor to ensure compliance with the standards of taste and decency.

On this point we think it important to re-emphasise that under PhonepayPlus' regulation of premium rate services the broadcaster would be defined as the Information Provider in the value chain and would no doubt be contractually obliged by their Service Provider to ensure that the service was run in a manner that complied with PPP's code of practice. Indeed PPP under its 11th Code is already able to raise breaches against the broadcaster/network in certain situations, so there is a current regulatory method of pointing the ownership of regulatory responsibility to the broadcaster particularly in relation to the use of PRS. Such self regulatory methods could simply be extended.

The PRA has no objection to the suggestion that TV services/products may be billed by PRS only, although we note that VISA, MasterCard and other credit or debt card companies may have issues and questions about the methodology of restricting their payment method.

We support a level playing field within which all channels operate under the same rules enforced consistently. It is not the small 'questionable' channels generating complaints, as PPP will testify; the harm generated by broadcasters has historically been by the well known terrestrial brands.

Premium Rate Services are either acceptable as a tool for interaction or not. We are concerned that rather than providing clarity and transparency the proposals are creating further grey areas and restriction on consumer choice. Your document defines PRS as a product or service yet when you go to your own website and ask what is a premium rate service the answer as follows is given:-

## **“What are premium rate services?”**

With mobile phones being so popular, there are a whole range of interactive services that consumers can now take advantage of. These can range from receiving a daily horoscope, following football scores or downloading the latest ringtone. Although these services often provide a benefit, sometimes consumers can find that they have been signed up in error or are receiving more text messages than were originally requested. Because the costs associated with these services are expensive (sometimes £1.50 per text), if you have not agreed to receive them, they can prove to be very costly.”

In relation to whether the rules should apply to radio and TV, whilst disagreeing with the proposed rules, it would seem sensible for both genres of broadcasters to be under the same license obligations. The goal of increased consumer confidence in PRS as a payment mechanism requires consistency of regulation.

Unfortunately, it is the Premium Rate Association’s view that the current Ofcom proposal does not strike a balance between public protection and the interests of the industry. It is our belief that the proposal strays away from the regulation of a payment mechanism and into the censorship of personal choice through entertainment. Therefore we have concerns that the proposal is contrary to the view expressed in the conclusion of the Culture, Media and Sport Select Committee’s 2007 report on Call TV Quiz Shows, that regulation ‘should not be overly censorious in nature’.

It was the clear view of the Select Committee in the conclusion of its report that there should be a drive towards a single regulator.

We wish to question what benefit, other than censorship, can be obtained by proposals to reclassify content. It is the view of the PRA that consumers make their choice about television content based upon the entertainment value they obtain from it, not on a regulatory definition. It is unlikely that the average consumer registers the distinction between the teleshopping classification and the editorial bracket in a way that extends them any additional protection. The proposals therefore add further complexity rather than clarity to the way participation television operates, without any public protection benefit.

Consumers already have the power of personal censorship through the remote control and the PRA is concerned that the industry is set to be damaged by Ofcom proposals that provide no clear public protection benefit. Surely the job of the regulator as defined by the Better Regulation Task Force is to provide transparency, accountability, targeting, consistency and proportionality. We believe that to ensure consumer choice it is important for the regulator and industry to sit down and have proper dialogue on these issues, allowing the industry the opportunity to address concerns without recourse to draconian measures.

The European Television Without Frontiers Directive (2007) aimed to relax the boundaries between advertising and editorial content; freeing up broadcasters to be more

creative with their revenue streams through the integration of audience participation, advertising and editorial. It is unclear how, in the spirit of this directive, these proposals can be seen as anything other than a retrograde step.

In this consultation Ofcom has not demonstrated what consumer harm these types of channel present, there has been no risk assessment nor has any evidence been presented to show that they cause damage. This appears to be a knee-jerk reaction which will lead

to censorship and a reduction in consumer choice and benefit. It could be argued that censorship of this nature is by its very nature tantamount to consumer harm.

We are concerned by the apparent return to the 'Mary Whitehouse' censorship of the past; a system which has been proven to be unpopular and ineffective. We hope that Ofcom will steer away from implementing a similar totalitarian regulatory regime.

It is indeed an interesting point that the magazine Whitehouse a porn title was established to reflect upon her censorship and campaigning, as an industry we are wary that once entertaining PTV channels are censored in this manner that the next censorship will occur through the barring of advertising in any medium.

We would argue that in fact on line and the unregulated global internet is the place where there is more potential harm in relation to minors and children being subject to sexual and physic content.

After considering various pieces of legislation it is our opinion that Ofcom is at the least acting unlawfully at the worst illegally in its obligation under UK, EU and human rights legislation to allow freedom of expression.

We would welcome an invitation to meet with you to discuss further, so that we can come to an amicable resolution for broadcaster, viewer and Ofcom.