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**Participation TV – Rules on the promotion of premium rate services (“PTV3”) – A response by The Participation TV Broadcasters Association**

**The Participation TV Broadcasters Association (“PTVBA”)**

Founded in 2007, “PTVBA” is an industry association whose founding members have extensive knowledge of the Broadcast and Telecommunications market place including applicable regulations. PTVBA members comprise 100% of the dedicated Psychic PTV Broadcasters and 80% of the Adult PTV Broadcasters. As well as Broadcasters, its membership embraces others such as studio and telecoms providers offering valuable support services. The Association welcomes new members who can demonstrate that they agree with its objectives including its commitment to upholding best industry standards.

PTVBA would welcome the opportunity to engage with Ofcom and BCAP in considering the scope for evolving a self or co-regulatory model by or with dedicated Adult and Psychic TV broadcasters. With 100% of dedicated Psychic PTV broadcasters and approximately 80% of dedicated Adult PTV broadcasters being members of PTVBA, we feel that we would be ideally positioned to fulfil this role.

**Additional Comments**

We believe that Ofcom ought to have considered and should still consider an Option 5, namely that of a new dedicated self or co-regulatory body truly charged with the preparation, implementation and on-going management of a code of conduct which fairly reflects the interests of all stakeholders. Both PhonepayPlus and BCAP reflect sector specific examples of bodies having delegated authority in this respect.

We believe Ofcom should limit their regulatory activity to the requirements set down in The Audiovisual Media Services Directive (*89/552/EEC amended by 97/36/EC and 2007/65/EC*). Article 19 makes clear that the requirement for television advertising and teleshopping to be kept quite distinct from other parts of the programme is to be “without prejudice” to the use of “new advertising techniques”. Participation Television is innovatory and given its reclassification as teleshopping, clearly falls to be seen as a pioneering example of a new advertising technique. We believe that in their current form, Ofcom’s proposals are prejudicial to the overwhelming majority of stakeholders. We expand further on our reasoning below. We believe that prejudice may be removed were Ofcom to consider an Option 5 as summarized above.

With regard to Psychic TV, we believe Ofcom’s impact assessment has failed to understand the critically important relationship in terms of service profitability and therefore continued viability that exists between the dedicated Psychic PTV broadcasts and other broadcasters who simulcast the shows. The non-dedicated PTV broadcasters are for the best part dependent upon advertising revenues, and therefore not wholly reliant on the income they derive from simulcasts. The reverse is not true. The continued operation of the dedicated Psychic PTV broadcasters is dependent on the ability to work with other non-PTV broadcasters. It seems clear that Ofcom have not appreciated this issue. There is no evidence in the impact assessment to suggest that Ofcom have carried out a sufficiently detailed analysis of the impact that restricting the distribution and promotion of Psychic content would have on the non-PTV broadcasters and more particularly the dedicated Psychic PTV broadcasters.

The reorganisation of the Sky EPG (some 4 years ago) and its current structure is based purely on a commercial decision by Sky. It was not an Ofcom or legal requirement. Beyond granting an EPG license to Sky there is no history of Ofcom being responsible for mandating the generic organization of channels in the Sky EPG or any other platform including Virgin and more significantly Freeview. Their proposed assumption of responsibility in this respect is inherently anti-competitive, unjustified and, we submit, in contravention of Article 19 of The Audiovisual Media Services Directive. Viewers and consumers not having access to a platform with an EPG stand to be deprived of choice whilst those broadcasting on the Freeview platform will be deprived of valuable revenues and the right to compete.

PTVBA does not agree with Ofcom amending the Broadcasting Code to limit participation in editorial programmes to PRS only nor do we see how Ofcom have lawful authority to do so. We believe that subject to appropriate safeguards designed to protect the more vulnerable members of society and in particular children, that the choice of payment method should be determined solely by market forces.

PTVBA are of the view that all free to air license holders are, under the Audiovisual Media Services Directive, guaranteed carriage on any free to air platform and that accordingly any implementation by Ofcom of rule changes designed to fetter or otherwise restrict that right, is unlawful.

Ofcom invites responses from stakeholders, particularly on the following questions:

**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?

We consider the Summary of relevant stakeholders set out in paragraph 6.67 of the consultation to be reasonably accurate.

However, in respect to Psychic PTV services we have the following additional comments:

1. We agree that there are a limited number of Psychic PTV broadcasters. Whilst there may, as at September 2009, have been only two dedicated Psychic PTV channels, this substantially understates the number of broadcasters and other "relevant stakeholders" (as referred to in paragraph 6.67 of the consultation) who will be majorly affected since the reference to only two dedicated Psychic PTV channels excludes other channels in the general entertainment section of the EPG with whom there are simulcast arrangements in place.

The consultation document explains at paragraph 6.39 that Ofcom's overview has "also been informed by information provided by the industry to Ofcom in response to information requests conducted in the course of the project". What Ofcom did not investigate was the extent to which the profitability and therefore continued existence of the dedicated Psychic TV channels is critically reliant on the ability to have broadcasters in the general entertainment section of the EPG simulcast PTV. For this reason the overview is fundamentally flawed.

If the dedicated Psychic PTV broadcasters are unable to simulcast with other non dedicated Psychic PTV channels it is our view that they will no longer be financially viable and therefore have to cease broadcasting. Both the primary broadcaster, the channel carrying the simulcast and other dependent stakeholders, will suffer significant revenue loss. The value chain is reliant on valuable and important fee based /revenue share based commercial arrangements between the dedicated Psychic PTV broadcasters and non-PTV broadcasters.

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

Please see our response to Question 1a).

**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 appears merited?

We should make clear that we do not believe that arguments advanced by Ofcom have been sufficient to justify the reclassification of Adult and Psychic PTV services as advertising and regulated as teleshopping under the Television Advertising Standards Code.

Subject to the foregoing caveat, given that Ofcom appear set on reclassifying such services as teleshopping, we agree that a change to the existing Advertising Code rules is merited. We nevertheless have grave reservations regarding Ofcom's analysis of the options.

In particular, it is the nature, extent and lack of credible justification for many of the changes proposed that give rise for concern.

We are of the view that the current proposals go substantially beyond the satisfaction by Ofcom of their regulatory duties, summarized in the consultation document to be:

- consumer and viewer protection
- ensure the freedom, availability and competition between different audio-visual services
- that regulation should be proportionate to relevant objectives

It is all too evident that there is little desire on the part of the overwhelming majority of stakeholders for significant rule changes. This no doubt reflects the finding in paragraph 7.7 of the consultation document that "there is little evidence of consumer harm to adults from the use of the product".

The Essential Research reveals that participants were of the opinion that "the product" has a "right to exist", that they wanted "freedom of choice", were resistant to "the idea of a "nanny" state" and that only "a small minority" believed the product to be harmful.

Participants concern that promotion of the product should be "in places where people would expect to find it" and that "in the right place and at the right time promotion of the product on TV would be acceptable" is already addressed by the relevant broadcasters and platforms who take very seriously their duty to avoid causing offence, of protecting the vulnerable and in particular children.

b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?

We have, in our response to Question 2a set out Ofcom's own summary of their regulatory duties. We firmly believe that the current proposals go substantially beyond the satisfaction by Ofcom of their regulatory duties. We believe that of the Options presented, Option 2 suggests least potential impact on stakeholders.

Ofcom, at paragraph 6.24 of consultation document, note that "participants did not object to the promotion of the product on TV per se....." in the right place and at the right time"

The principles underpinning this view are expressed to be:

- a. Control - over choice of exposure to the product for self and others (in particular children)
- b. Containment – keeping such promotions away from mainstream audiences.

We believe that by the use of appropriate labelling, positioning and scheduling, viewers will be readily able to distinguish editorial from teleshopping content and be protected from content which might cause offence or otherwise expose the vulnerable, particularly children, to risk.

Article 19 of the The Audiovisual Media Services Directive (89/552/EEC amended by 97/36/EC and 2007/65/EC) ("the Directive") requires that "television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content". The requirement that "television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means" is to be "without prejudice" to the "use of new advertising techniques" – which we believe participation PTV to be.

We believe Option 4 in its current form is a disproportionate response to viewers concerns and that it will be prejudicial to Adult Chat PTV broadcasters as well as viewers who stand to be deprived of choice if they happen not to have access to a platform carrying an Electronic Programme Guide.

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?

We can see no justification for limiting the availability of Adult Chat PTV to any particular platform or unreasonably curtailing viewer choice. We do not see that the available evidence provides support for such restrictions. We believe that Ofcom's proposed EPG positioning requirements would be unlawful since they conflict with the requirements of the Directive.

The emphasis placed on the availability of an ““Adult” or similar section of an Electronic Programme Guide” is an unnecessary and wholly disproportionate response, one which, discriminates in favour of certain vested commercial interests (for example Sky) over others, is anti-competitive in that it will constrain the free flow of market forces including the development and implementation of new technologies and removes choice from viewers who only have access to the Freeview platform.

**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?

The comments including reservations expressed in response to Question 2a are equally applicable to this Question and therefore for the purpose of our response to this Question 3 a) should be regarded as being repeated in full. Subject to the foregoing, we agree that a change to the existing rules is merited.

b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?

In respect to Psychic PTV, whilst of the Options presented we would favour Option 2, we are compelled to recognize that Ofcom favour Option 4 and are therefore most unlikely to waver from that position. Faced with this unpalatable sense of inevitability, we feel Option 4 should only come into being if Ofcom agree to substantial amendment of the proposed wording for that Option.

We believe that the proposed labeling and positioning rules are incompatible with Ofcom’s regulatory duties, summarized at paragraph 7.29 to be:

1. Consumer and viewer protection;
2. Ensuring the freedom, availability and competition of different audio-visual services;
3. Regulation should be appropriate and proportionate to these objectives.

As indicated in our response to Question 1a), we believe Ofcom have failed to understand the critically important relationship in terms of service profitability and therefore continued viability, that exists between the dedicated Psychic PTV broadcasters and other broadcasters who simulcast. The non-dedicated PTV broadcasters being for the best part dependent upon advertising revenues, and therefore are not wholly reliant on the income they derive from simulcasts. The reverse is not true. The continued operation of the dedicated Psychic PTV broadcasters is dependent on the ability to work with other non-PTV broadcasters.

c) that the restriction of promotion to specific live personal psychic services and the requirements for labelling and EPG position provide appropriate protection for viewers?

We support measures which afford viewers appropriate protection. It is noteworthy that the BCAP Code in its existing form contains numerous protections for children and the more vulnerable members of our society.

We do not feel that it is appropriate to introduce changes the effect of which will be to close down dedicated Psychic PTV as a broadcast genre on UK television. This will deprive viewers and consumers of choice and is a wholly disproportionate measure. Nor do we believe this is the intention of Ofcom or those participating in the Essential Research.

We have explained in our response to Questions 1a) and 3b) that we believe Ofcom have failed to appreciate the significance to the Psychic PTV broadcasters of being able to simulcast with Non-PTV broadcasters.

It is similarly not apparent that Essential understood this significance since if they did it ought surely to have been pointed out to the participants in their research.

The Essential Research findings explain “most did not object per se to the promotion of psychic premium rate telephone services: in the right place and at the right time, promotion on television could be considered acceptable”.

The principles underpinning this view are expressed to be:

- a. Control - over choice of exposure to the product for self and others (in particular children)
- b. Containment – keeping such promotions away from mainstream audiences.

The over-arching conclusion was that “Despite negative views towards the product, most participants supported a continuation of long form promotion of this product on television”.

It would not have been apparent to the participants that the continued existence of the dedicated Psychic PTV broadcasters was dependent on their ability to have Non-PTV broadcasters simulcast their output.

Since participants lacked this critical awareness it follows that the same did not feature in their consideration of possible restrictions which restrictions, in isolation, would tend to support Ofcom’s current proposal regarding Option 4.

In determining the appropriate protection for viewers, we believe it is relevant to consider how representative the participants in the Essential Research were of the UK adult population as a whole. We feel it is incumbent on Ofcom to have regard to the

very small number of participants and their apparent lack of interest in Psychic premium rate telephone services when considering how best to discharge Ofcom's regulatory duties, summarized at paragraph 7.29 to be:

1. Consumer and viewer protection;
2. Ensuring the freedom, availability and competition of different audio-visual services;
3. Regulation should be appropriate and proportionate to these objectives.

The Essential Research findings in respect to Psychic services are based on a very small sample group (113 participants). Whilst around two thirds were aware of psychic TV channels only one in five participants claimed to have viewed a psychic channel and a far smaller proportion still (around one in fifty) claimed to have ever called or texted a Psychic TV premium rate service.

Whether the small sample group can be regarded as representative of UK viewers must be questionable. The sample group appears to have been far too small and by their own admission, either not interested in or not familiar with Psychic PTV.

The fact that UK viewers are far more familiar with Psychic PTV than the Essential Research would suggest is evident at paragraph 6.61 of the consultation document which explains that:

“The online quantitative research commissioned by Ofcom for the 2007 consultation suggested that Psychic TV was regularly viewed by 3% of all television viewers, and 1% of all television viewers had called a Psychic PTV channel”

It is clear that since the number of respondents, their awareness, interest in and experience of, Psychic services/Psychic premium rate services was so small and sparse, it would be inappropriate were Ofcom to introduce, without qualification, a rule change based on the responses given by a partially informed, non-representative, sample group.

Appendix C (page 91) to the Essential Research explains that participants were given two different scenarios to consider, each of which included a reference to advertising being carried on “other general entertainment channels such as Living or ITV2”. It is regrettable that no detailed data is given as to participant responses to these scenarios and in particular the reference to “other general entertainment channels”. On page 102 we note that participants were given Ofcom's options for regulation, not one of which makes reference to “other general entertainment channels”.

We feel that there is good reason to believe that as a result of omitting any express reference to general entertainment channels in the options for regulation, participants were steered in the direction of Ofcom's favoured Option 4 and the proposed rule 15.5.2 whereby channels advertising the services referred in the rule would be restricted to a “Specialist” or similar section of an Electronic Programme Guide”.



We believe there is no sustainable justification for, nor does the available evidence credibly support, the introduction of a rule as restrictive as that set out in rule 15.5.2 in its current form.

We believe that had the participants to the Essential Research - better still a more substantial and representative sample of participants - been asked whether they had an objection to advertising of Psychic PTV on general entertainment channels (other than public broadcasters or those targeted at children), subject to appropriate labelling and positioning, that they would not have not seen any reason for restricting viewers choice in the manner presently proposed by Ofcom.

We believe the proposed addition to rule 15.5 goes beyond that which is necessary in order to protect viewers.

Viewers want clear labeling and control. That can be readily achieved by the existing platforms and technology. They also want choice and that will be removed if the current wording is implemented without change.

The proposed addition to rule 15.5 will not only remove choice. It will reflect a failure to balance the interests of viewers with the legitimate interests of the other four stakeholder categories identified by Ofcom at paragraph 6.67 of the consultation. Ofcom should balance the interests of all stakeholders and we do not feel this is achieved by the proposed addition to rule 15.5.

For the avoidance of doubt, we should make clear that we do not support Option 4 unless Ofcom reflect our concerns as set out in this response.

In our response to Question 4 (b) we comment on the proposed wording to be added to Rule 15.5 of the Advertising Code.

**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)?

We are supportive of changes which are proportionate and appropriate.

Promotion of PRS of a sexual nature (rule 11.1.2)

We agree with the carrying over from the Broadcasting Code to the Advertising Code of provisions which are designed to protect minors, the vulnerable and causing inadvertent offence to others who might chance across adult PTV content unawares.

We support clear labeling and appropriate positioning of channels designed to avoid the risk of offence. This can be readily achieved on open access channels. Subject to the foregoing, we believe that restrictions on spot advertising, the simulcasting by non-PTV broadcasters of content generated by dedicated-PTV broadcasters or an insistence that platforms having a separate “Adult” EPG section, are unwarranted and prejudicial to the overwhelming majority of stakeholders.

#### Psychic Practices (rule 15.5)

We would observe that throughout the consultation there appears to be an over-emphasis on reference to PRS as a payment mechanism for Psychic PTV products and services (see for example paragraph 7.37 of the consultation document. Payment mechanisms should be driven by market forces and available technologies. Subject to appropriate safeguards, we do not favour any regulatory restrictions regarding the manner in which consumers can pay for products and services. However, we note that in paragraph 3.23 Ofcom make clear that channels broadcasting as teleshopping, because they are subject to the Advertising Code, will not be subject to any constraints regarding the method payment. On this basis we would not propose to make any specific amendment to enshrine this very important point.

We believe however that in relation to rule 15.5.2 the proposed scheduling restrictions are excessive.

We believe that there is a possible conflict between Rule 15.5 and the proposed addition to rule 15.5. The former permits television advertisements which promote services that “would obviously be applicable to *a large section* of the population”. Rule 15.5.2 focuses on advertisements that represent a more niche form of entertainment appealing to a more limited but nevertheless significant, section of the population.

We believe that the scope for conflict between provisions of the Code can be avoided if a new provision is included whereby in the event of a conflict between Rule 15.5.2 and any other Rule of the Code, the provisions of Rule 15.5.2 shall apply.

We believe the use of the word “derivative” in Rule 15.5.2 requires clarification since the objective of good drafting must to be avoid future scope for uncertainty. We would ask that Ofcom clarify their intentions in this respect and permit further comment on the same before any final decision is taken on the wording.

We agree that clear labeling is desirable to ensure transparency and to avoid causing offence.

We believe this can be achieved using the existing platforms and technologies coupled with an amendment to the proposed addition to rule 15.5 (see below). In particular, we cannot see that it is appropriate to introduce a rule change which would disproportionately and negatively affect the majority of stakeholders. There is no reasonable justification for prohibiting broadcasters from simulcasting Psychic PTV

or promoting such services on Freeview. Such prohibitions would, in our view, bring an end to Psychic PTV as a broadcast genre for UK viewers and consumers.

We believe that the appropriate way forward is that channels carrying long form promotion of Psychic PTV services should be clearly labeled. This would conform with the requirement of Article 19 of the The Audiovisual Media Services Directive (89/552/EEC amended by 97/36/EC and 2007/65/EC provides that “television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content. That Article does not require that “new advertising techniques” – which we believe participation PTV to be – should be prejudiced by this requirement. It merely requires that “television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means”.

Ofcom acknowledge in paragraph 3.49 page 20 that “on the risk of harm, there is no evidence that would suggest widespread harm to legitimate consumers from the use of PRS of a sexual nature or most types of psychic PRS. Consumers of these services are self-selecting and able to exercise their choice, with existing rules in place operated by PhonepayPlus to control the risk of harm from use of the products”.

Given the foregoing factors, we feel that the addition to rule 15.5 should be one which:

- a. protects viewers from offence by requiring clear labelling;
- b. permits freedom of choice for viewers and consumers;
- c. promotes enterprise and innovative technologies as well as the legitimate business interests of affected stakeholders;
- d. does not seek to introduce requirements over and above those required by law.

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

**Proposal for revised rule on PRS of a sexual nature in Advertising Code (to replace current rule 11.1.2)**

We have made clear that we support Option 2.

If Ofcom insist on proceeding with their preferred Option 4 we would suggest the following alternative wording:

“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.

- 1) Advertising for telecommunications-based sexual entertainment services is only acceptable on:

- i) Encrypted elements of adult entertainment channels, or
  - ii) Channels that are licensed for the promotion of the services and are appropriately positioned and labelled.
- 2) Advertising for telecommunications-based sexual entertainment services must not be broadcast before 9pm or after 5:30am

*Note: Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Broadcasting Code”*

### **Proposal for addition to rule on psychic practices in the Advertising Code (to be added to rule 15.5)**

#### **Rule 15.4**

Television 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 ouija, satanism, casting of spells, palmistry, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

#### **Rule 15.5 – Television only**

Television 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.

#### **Rule 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.

#### **15.5.2**

Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and [derivative] practices are acceptable only on channels that are appropriately positioned and labeled in a manner that enables viewers and consumers to readily recognize the nature of the product or service. Both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only. In the event of there being a conflict between the

provisions of this Rule 15.5.2 and any other Rule of this Code the provisions of this Rule 15.5.2 shall apply.

### **15.5.3**

Advertising permitted under rule 15.5 may not:

- o Make claims for efficacy or accuracy;
- o Predict negative experiences or specific events;
- o Offer life-changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- o Appeal particularly to children;
- o Encourage excessive use.”

### **Close**

If any clarification regarding our response is required or you require further assistance, please contact Peter Welburn on 02380 230500 – [peterwelburn@btconnect.com](mailto:peterwelburn@btconnect.com)

**PARTICIPATION TV BROADCASTERS ASSOCIATION**