



**Ofcom Consultation on Participation TV:  
Rules on the Promotion of Premium Rate Services (“PRS”)**

**Sky Response**

This document comprises British Sky Broadcasting Limited’s (“Sky”) response to Ofcom’s consultation dated 3 November 2009 concerning its proposals to revise the advertising rules in relation to the promotion of premium rate services (“Consultation Document”).

**1. Requirement to be appropriately labelled and positioned within the electronic programmes guide (“EPG”)**

1.1 We note that under Ofcom’s preferred Option 4, Ofcom proposes to amend the Television Standards Advertising Code (the “Advertising Code”) such that:

(a) PRS of a sexual nature (“Adult PRS”) must not be broadcast before 9pm or after 5.30am and would only be acceptable on:

- encrypted elements of adult entertainment channels; or
- channels that are (i) licensed for the purpose of the promotion of the PRS and (ii) are appropriately positioned and labelled within an “Adult” or similar section of the EPG; and

(b) Personalised and live psychic PRS (“Psychic PRS”) would only be acceptable on channels that are (i) licensed for the purpose of the promotion of such PRS and (ii) are appropriately positioned and labelled in a “Specialist” or similar section of the EPG. In addition, both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only.

1.2 This proposal is flawed in that it relies on EPG providers (such as Sky, Freesat UK and Freeview) listing channels that include Adult PRS in the ‘Adult’ genre of their EPG, and listing channels that include Psychic PRS in the ‘Specialist’ genre of their EPG. However, EPG providers are under no regulatory obligation to list channels in any particular genre, but merely to allocate EPG listings in accordance with an objectively justifiable methodology. As the method for allocating listings and the actual allocation of listings is ultimately decided by the EPG provider, this means that (i) broadcasters have no control over the genre in which their channel is listed and (ii) Ofcom is effectively devolving responsibility for regulating these channels to EPG service providers. Not only is this inappropriate, but also, broadcasters could find themselves inadvertently in breach of the Advertising Code should an EPG provider decide (appropriately, in accordance with the relevant listing methodology) to list their channel in a genre other than Specialist or Adult, or should the EPG provider cease to list channels according to these particular genres.

1.3 Ofcom acknowledges that the majority of Freeview set top boxes do not currently have a segregated EPG with an “Adult” or “Specialist” genre and do not support encrypted channels. Accordingly, broadcasters of Adult PRS or Psychic PRS on the Freeview

platform would, under Option 4, either have to quit the platform or change their content such that they no longer include Adult PRS or Psychic PRS. Ofcom's proposed Option 4 is therefore discriminatory. Ofcom has failed to consider adequately this consequence of its preferred option.

## **2. Requirement for Adult PRS and Psychic PRS to be broadcast on dedicated channels**

- 2.1 Under Option 4, Ofcom proposes that channels which broadcast Adult PRS or Psychic PRS would need to be on "dedicated channels" which are licensed for the purpose of the promotion of such PRS. However, it is not clear from the proposed Advertising Rules (as currently drafted) whether such channels must be dedicated *purely* to Adult PRS or Psychic PRS or whether they may also broadcast other types of content. If it is open to such channels to broadcast content other than Adult PRS or Psychic PRS, then there is a greater risk that such channel would be allocated a listing in a genre other than 'Adult' or 'Specialist'. For example, if a channel on the Sky platform were to broadcast 50% gaming content and 50% Psychic PRS content, then under Sky's current published method for allocating listings, such channel may be listed in the Gaming sub-genre of its EPG, with the result that such channel would be in breach of the proposed Advertising Code rules. If Ofcom intends to persist with Option 4, then Ofcom should therefore amend the proposed rules or introduce guidance to clarify to what extent channels licensed for the broadcast of Adult PRS or Psychic PRS may broadcast other content.

## **3. Meaning of "encrypted"**

- 3.1 Under Ofcom's proposed Advertising Code rules, Adult PRS content would be acceptable on "*encrypted elements of adult entertainment channels*" which for the purpose of these rules "*are interpreted with reference to rule 1.24 of the Broadcasting Code*".

Under rule 1.24 of the Broadcasting Code, premium subscription and pay per view/night services may broadcast "adult sex" material between 2200 and 0530 provided that:

- There is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view
- There are measures in place that ensure that the subscriber is an adult
- Information is provided about programme content that will assist adults to assess its suitability for children
- There is a detailed billing system for subscribers which clearly itemises all viewing including viewing time and dates
- Those security systems which are in place to protect children are clearly explained to all subscribers.

- 3.2 It is not clear from the proposed new Advertising Code rules what Ofcom means by "encrypted elements of adult entertainment channels" in this context. The reference in the proposed new Advertising Code to Rule 1.24 of the Broadcasting Code suggests that "adult entertainment channels" means premium subscription services and pay per view/night services; however, at paragraph A7.25 of the Consultation Document Ofcom acknowledges that viewers would not necessarily have to pay a subscription to be able to access "Adult Chat" services on an "encrypted" basis. For example, a channel may be encrypted on the Sky platform on a "free to view" basis such that it is freely available for anyone with a valid viewing card. Viewers can obtain a viewing card from

Sky provided that they confirm to Sky that they are at least 18 years old. Once a channel has been encrypted on a free to view basis, then we anticipate that it will be possible (subject to testing) for the broadcaster to apply a mandatory PIN to the channel. Ofcom appears to suggest at Paragraph A7.25 of the Consultation Document that, in order to comply with the proposed new rules, it would be sufficient for a channel to be encrypted on a free to view basis and a mandatory PIN applied. However, this fails to take account of the additional protections required by Rule 1.24 of the Broadcasting Code.

- 3.3 Ofcom should therefore clarify whether, in order to fall within the meaning of “encrypted elements of adult entertainment channels” under the proposed Advertising Code rules, a channel must be a subscription or pay-per view service, or whether it may also be a service which is available on a free to view basis. If the latter, Ofcom should clarify whether all of the measures listed at paragraph 3.1 above are required, taking into account the fact that a channel that is encrypted on a free to view basis would not be able to comply with all of these measures. For example, a detailed billing system which itemises all viewing would not be appropriate for a channel that is not provided on a subscription or pay per view basis.

#### **4. Sky’s charges for encryption services**

- 4.1 Paragraph A7.32 of the consultation document states that *“For services using the Sky satellite platform, encryption services are provided by SSSL, a subsidiary of BSkyB. SSSL publishes a ratecard which provides an indication of the scale of costs that could be incurred in providing encryption for sexual content but this is the basis for a negotiation rather than a final tariff. Broadcasters have used the SSSL ratecard to provide an estimate of the nature and scale of costs that they might incur in adopting a system of encryption. This suggests that there could be one-off (non-recoverable) set up costs in the region of £100,000 per broadcaster. In addition there would then be an annual Conditional Access (CA) fee in the order of £25,000 per broadcaster. There may then be additional costs on a per subscriber and/or per call basis. Broadcasters have indicated that SSSL’s terms would be likely to require 5% of the call revenue.”*

- 4.2 This paragraph is inaccurate for a number of reasons. First, Sky’s charges for encryption (“conditional access”) services are set out in Sky’s published price list which is published at <http://corporate.sky.com/about/sky/regulatory-information.htm> (“Published Price List”). Sky’s charges for encryption services do not form the “basis for a negotiation rather than a final tariff”; the charges published are the actual amounts charged. Sky is has a contractual right to change its published charges on 90 days’ notice to broadcasters.

- 4.3 Second, assuming that Ofcom would consider it to be sufficient to comply with the proposed new rules if the service were encrypted on a free to view basis and a mandatory PIN applied, the following charges would currently apply:

- (a) £15,000 (plus VAT) to establish a generic automatic entitlement conditional access service,
- (b) £25,000 (plus VAT) per channel per annum where the channel is to be made available to all valid viewing cards in the UK, ROI, Channel Islands and Isle of Man.

There are no per subscriber or per call charges for this service.

- 4.4 Third, broadcasters wishing to distribute their channel(s) on a subscription or pay per view (“PPV”) basis would currently be required to pay the following charges:
- (a) £50,000 (plus VAT) to establish a subscription and/or PPV conditional access service, including integrating the distributor’s customer management system to the Sky platform and providing initial conditional access templates
  - (b) conditional access charges and access card charges of £5,000 (plus VAT) per annum per channel
  - (c) a charge per subscriber per month (subscription channels only) based on the monthly retail subscription charge (ex VAT)
  - (d) a charge per pay per view purchase (pay per view channels only) based on the retail PPV charge.

There are no per call charges for this service.

- 4.5 The encryption charges set out at Paragraphs 4.3 and 4.4 above are discrete from the charges for EPG services which are also set out in Sky’s Published Price List.

## **5. Regulation by Ofcom**

- 5.1 We understand that Ofcom, rather than the Advertising Standards Authority or the Broadcast Committee of Advertising Practice, will regulate and enforce the proposed new Advertising Code rules with regard to Psychic PRS and Adult PRS. We support this as we consider Ofcom to be the appropriate regulator to deal with complaints regarding Adult PRS and Psychic PRS, since Ofcom has the most experience in this area.
- 5.2 However, the fact that Ofcom will regulate these services following the introduction of the new Advertising Code rules is not explicit either within the Consultation Document or the wording of the proposed new rules. The rules should therefore be clarified so that there is no confusion as to which regulatory body will be responsible for regulating Adult PRS and Psychic PRS going forward.

**Sky, January 2010**