

**Ofcom consultation on:
Participation TV Part 2:
keeping advertising separate from
editorial**

A response by the
Participation Television Broadcasters Association Ltd
June 2008

Summary

- I) This reply to the OFCOM Consultation on Participation TV Part 2, Keeping Advertising Separate from Editorial, is submitted on behalf of the Participation Television Broadcasters' Association (the "Association"). As evidenced in this submission, the current members of the Association cannot continue to operate if the proposals in the Consultation are implemented.
- II) In Part 1, the Association argues that the proposals in the consultation, if implemented, would be illegal. The Association submits the opinion of Pushpinder Saini QC of Blackstone Chambers ("the Opinion") at Annex 1. In particular:
 - a) There is nothing in the ECJ's judgment of 18 October 2007 in Case C-195/06, *Kommunikationsbehörde Austria v Österreichischer Rundfunk* ("the ECJ Judgment") or Council Directive 89/552 ("the Directive") which required Ofcom to arrive at the position set out in the Consultation.
 - b) Ofcom has given no consideration to: (a) whether the BCAP Code should be amended; (b) the financial implications of the proposals for stakeholders and matters such as the feasibility of adhering to the BCAP Code requirements; or (c) the needs and wishes of consumers.
 - c) Ofcom has given no consideration to the correctness on the *merits* of the end result of its proposals but has concluded that this result simply follows from the reclassification.
- III) The end result of the proposals amounts to a violation of the right to freedom of expression under the European Convention on Human Rights.
- IV) In Part 2, the Association makes additional observations to demonstrate that there is no logical reason why use by the members of premium rate services should lead to a reclassification of their channels as "advertising". Even if a reclassification is undertaken, there is no logical reason why psychic channels should be banned and adult chat channels encrypted. In particular, there is no logical link between encryption and ensuring that viewers are not misled. If a programme is misleading, viewers will be misled by watching it, whether the channel is encrypted or not.
- V) If Ofcom is minded to re-classify channels as "advertising", then Ofcom (and BCAP) must review the BCAP Code to ensure that, in the absence of evidence of harm, evidence of viewers being misled, and complaints, the members of the Association do not become the casualty of a reclassification exercise.

The Participation Television Broadcasters Association Ltd is a newly formed association open to all Participation Television Broadcasters and to network providers and telecommunications operators. The current members provide dedicated Participation TV channels. A list of all channels and all licensees that belong to the Association is provided at Annex 3. The intention of the current members is that membership of the Association will continue to increase to embrace a number of telecommunications operators and network providers, as well as more mainstream providers of non-dedicated Participation TV providers and broadcasters.

The Association is grateful to Ofcom for the opportunity to discuss its concerns at a meeting on 2 June and for making it possible to have an extension of the original deadline, to take into account the points discussed at that meeting, to 5th June.

This response comprises two parts:

PART 1 – CONCERNS OVER THE LEGALITY OF THE PROPOSALS IN OFCOM'S CONSULTATION. This part is not confidential and may be published by Ofcom.

PART 2 – THE WAY FORWARD. This part is not confidential and may be published by Ofcom.

Enclosed with this response are the following Annexes:

- Annex 1: The opinion of Pushpinder Saini QC of Blackstone Chambers ("the Opinion"). Not Confidential.
- Annex 2: Chronology of regulatory measures. Not confidential.
- Annex 3: Member information - **Confidential**.

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**PART 1 –
CONCERNS OVER THE LEGALITY OF THE PROPOSALS IN OFCOM’S CONSULTATION**

ECJ Judgment

1. As stated in the Opinion, having arrived at the view in the 2007 Consultation that Option 2 was the preferred regulatory option (an option which was also favoured by stakeholders) Ofcom was diverted from this course by a view taken as to the relevance of the ECJ Judgment. However, the ECJ Judgment does not compel the change in stance taken by Ofcom.
2. The ECJ did nothing more than suggest some factors for application by the domestic court in assessing whether a specific quiz show was advertising or teleshopping. Whether or not the content of channels is now to be regarded as advertising is a matter for a case by case analysis.

Impact on Adult chat and Psychic

3. As Ofcom acknowledges in the consultation document, the effect of applying the BCAP Code as it currently stands will be that psychic channels will have to cease to operate and adult chat will only be permissible on encrypted channels. As detailed in Part 2, there are different routes to encryption and encryption serves a commercial purpose (namely generating revenue). It is not clear what is meant by Ofcom about “encryption”. In any event, there has been no consideration by way of impact assessment, or otherwise, of whether there was any need for encryption or cessation; whether or not encryption is possible in practice and a proper assessment of the financial implications for stakeholders.
4. As stated in the Opinion, it is not lawful for Ofcom to say that because it has reclassified the content as advertising the channels must simply live with the consequences of the fact that they are now subject to the BCAP Code (which means banning or encryption). Ofcom has to be able *itself* to justify that ultimate result. It is not sufficient to say the result follows because of the reclassification.
5. These channels have been operating for a number of years without encryption. Ofcom provides no reason for now encrypting or banning them, other than the assertion that these are the *consequences* of reclassification.
6. With regard to adult-chat, there has been no assessment of whether or not encryption is feasible: whether or not the technology will be offered and / or developed by Sky. As

detailed in Part 2 of this Response, the Association's view is that, on the basis of the information currently available (and on the basis of the previous dealings with Sky of some of its members), encryption will not be feasible..

7. As Ofcom accepts, the distinct issue of whether or not the content itself (however classified) raises issues of harm and offence is not relevant to the issue of separation or to this consultation process.
8. In any event, re-classification is not an appropriate or necessary means of addressing issues of harm and offence. Ofcom has the tools to deal with issues of harm and offence under the Broadcasting Code, which includes the following objectives:
 - 8.1 To ensure that people under eighteen are protected.
 - 8.2 To ensure 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 harmful and/or offensive material.
9. Under the Broadcasting Code, demonstrations of exorcisms, occult practices and the paranormal are permitted after the watershed, provided children are not likely to be watching or listening. Adult-chat is permitted without encryption after the watershed, provided it does not amount to "adult-sex material". Indeed, as indicated in Part 2, there are a number of free-to-air channels that broadcast after the watershed in the general entertainment section and whose content is much more explicit than the adult-chat content. The distinguishing feature of the channels provided by the members of the Association is that they use premium rate services. It seems very odd that this (the fact that the members of the Association use premium rate services) should result in a reclassification leading to their ultimate demise, as more particularly detailed in Part 2.
10. Ofcom has been actively and extensively enforcing the requirements of the Broadcasting Code to guard against public harm. In addition, Ofcom and PhonepayPlus have enhanced the regulatory measures which apply to participation television and premium rate services. The Chronology at Annex 2 outlining such measures shows that this sector has been subject in recent times to a very steep increase in regulation.

Impact on Quiz TV

11. Ofcom recognises the likely impact on the quiz genre at paragraph 4.25 of the consultation document: *"Quiz TV in its current form would not comply with the proposed rules. It would therefore need to either...change radically so that it complied with the*

proposed rules...or...be reclassified as teleshopping and regulated under the BCAP Ad Code.”

12. In particular, at paragraph 4.19 of the consultation document, Ofcom recognises that PSBs will “*no longer be able to broadcast quiz TV*” in its current format and, at paragraph 4.20, that “*Five could no longer broadcast Quiz Call...*”
13. It appears to the members of the Association that proposals leading to such a conclusion are draconian (or at the very least disproportionate), and contrary to the principles of good regulation. They also appear to fail to consider the needs and wishes of viewers and consumers.
14. As stated above, it is not lawful for Ofcom to say that because it has reclassified the content as advertising the channels must simply live with the consequences of the fact that they are now subject to restrictions. It is not sufficient to say the result follows because of the reclassification. Nor does the fact that “only Five now broadcasts blocks of quiz TV” provide a justification (paragraph 2.7 of the consultation document). Further, it is not good enough to say that the minutage restriction “could change” in the future (paragraph 4.21 of the consultation document).
15. Again, the distinct issue of whether or not the content itself (however classified) raises issues of harm and offence is expressly considered not relevant to the issue of separation or this consultation process. In any event, Ofcom has been very active in enhancing the regulatory measures which apply to quiz TV. This is acknowledged by Ofcom in the consultation document. We refer to the Chronology at Annex 2.

The wider implications of Ofcom’s proposals

16. At the highest level, the proposals will represent a significant blow to the general development of interactive television and alternative revenue streams. More particularly, the proposals will put a stop to and/or seriously curtail:
 - 16.1 The provision of dedicated PTV programmes on mainstream television.
 - 16.2 Both dedicated and non-dedicated PTV programmes which do not meet the new definition of “programme-related material” (viewers will now have to *benefit fully from* rather than *merely interact with* the programme).
 - 16.3 Both dedicated and non-dedicated PTV programmes which do not meet Ofcom’s new criteria for PRS: PRS will only be permitted where they are directly derived from a

particular programme and enable viewers/listeners to *participate/contribute directly* in that programme, rather than *form part of* the editorial content (which was the previous test).

17. Ofcom acknowledges the impact of the proposals on public service broadcasters at paragraph 4.18 of the consultation document:

“Unlike other channels, the commercial public service broadcasters (‘PSBs’), i.e. the Channel 3 licensees, Channel 4 and Five, do not have a daily teleshopping allowance of three hours in addition to their advertising minutage. They may run teleshopping windows between midnight and 6am, but only at the expense of spot advertising time.”

18. At paragraph 4.19 of the consultation document, Ofcom acknowledges that:

“...the proposed rules would mean that the commercial PSBs would no longer be able to broadcast quiz TV (or indeed any other dedicated PTV content) unless they changed that content...to comply with the proposed rules”

19. In light of the observations made about the ECJ Judgment above, we seriously question how this state of affairs came about, particularly given that:

- 19.1. Ofcom recognises that the ascent of Participation TV is linked to the loss of advertising revenue from traditional forms of “spot advertising” on TV channels¹ and accepts as an “intellectually valid” point of view that dedicated PTV can be seen as a new business model: programmes and channels funded not by advertising or sponsorship, but by viewers’ willingness to take part in them.²

- 19.2. The Culture Media and Sport Committee found that participation television programmes generate revenues for broadcasters and that, as television advertising becomes an ever smaller part of total spending on advertising, while audiences fragment, and while there remains a limited market for the pay-per-view television model, broadcasters are under severe pressure to seek out alternative sources of revenue.³

Financial Impact

20. A report commissioned by Ofcom suggests that the impact for the UK economy could be £118m in 2007 in respect of dedicated PTV (Mediatique, March 2007). Of this, it is estimated that the impact for the “TV chat” sector will be £20.3m. The Association

¹ Participation TV: how should it be regulated? Pre-consultation Issues Paper, paragraph 1.12.

² Participation TV: Protecting viewers and consumers, and keeping advertising separate from editorial, dated 24 July 2007, paragraph 6.2.

³ Third Report of Session 2006-07, paragraph 71.

believes that this figure represents only a fraction of the likely financial impact. A high level analysis of the costs borne by TV chat shows the following (based on the costs to air channels). The members estimate that there are about 600 persons directly employed in the TV chat sector. This means that the sector pays about £9 million in staff wages alone. To this, payments made to temporary and contract staff (which the Association members estimate to be about £14 million per year) should be added. Further Payments to suppliers (e.g. to transponders, BSkyB, equipment) amount to an estimated further £18m per year. This amounts to a total of £41m in costs alone, and already on this estimate it is apparent that the total revenue must be significantly higher than the revenue of 20.3m estimated in the Mediatique report for the TV chat sector. We refer to the analysis conducted by AIME and the statistics provided in their response, with which the members agree, namely that reclassification will result in a loss of over 2000 jobs and of £60-100m of annual revenues.

21. Of course, the revenue generated by the channels is not the only loss to the economy in the UK if the channels were to close down: revenue generated by suppliers such as network operators and Sky also needs to be factored in. We expand on this below at paragraphs 23 and following
22. It is clear that Ofcom has failed to carry out a full impact assessment of:
 - (a) the financial implications of the proposals, including indirect and unforeseen costs;
 - (b) the impact on small businesses;
 - (c) the impact on related industry sectors;
 - (d) matters such as the feasibility of adhering to the BCAP Code requirements;
 - (e) proportionality; and
 - (f) the needs and wishes of consumers.

Impact of the proposals on related industry sectors

23. The impact on dedicated participation TV channels/programmes is likely to significantly reduce revenues generated from these shows or shut them down altogether. This will clearly have a knock-on effect on the revenue collected by telecoms providers who supply the lines to these channels. Similarly, any wider detrimental implications of Ofcom's proposals (see above) will decrease revenues accordingly.

24. One of the contributors to this response (a telecoms provider) has confirmed an estimated loss of £6 million per annum in revenue. We have also seen the response of Com and Tel which highlights the potential for loss of business and future opportunities. In particular Com and Tel have:
- a) An application pending since Autumn 2007 with PhonepayPlus for an investment of £50,000 to increase its PTV capability. They are unable to move forward with this due to this consultation.
 - b) Investment of IVR capacity, building of new programmes and extra line installation - on hold since September of last year.
 - c) Two new clients, one a new style TV show, one a virtual PTV application which they are unable to proceed with under these new guidelines. They have already made significant investment for these and have had to put these projects on hold.
25. Clearly, this is only one company. A full impact assessment review will provide a fuller picture.

Human Rights Act 1998

26. As stated in counsel's Opinion, proposals which have the ultimate result of placing the channels into a system of regulation in which they cease to operate are likely to violate section 6 of the Human Rights Act.

Draft Guidance to the Broadcasting Code

27. As seen below, the draft guidance excludes the most prolific offenders of the broadcasting rules and consumer protection measures.
28. If the purpose of the reclassification is (as it must be) that consumers should not be misled when watching advertising, then to classify PTV services on the basis of pre-determined and objective criteria/ guidance will not reflect the true nature of the content of a service on case by case basis and would not, therefore, achieve the object of the separation principle.
29. The distinction envisaged in the guidance (and evidenced by Ofcom's own comments in the consultation document) could result in discrimination and differing standards of consumer protection.

**PART 2 -
THE WAY FORWARD**

1. The members of the Association share a common goal, namely to ensure that they can continue to operate as they have done over the past eight years, within the full respect of a transparent and non-discriminatory regulatory environment, applicable consistently across all genres. The regulatory environment in question should achieve the following objectives, which are hopefully uncontroversial:
 - (a) the protection of minors and of vulnerable people;
 - (b) the prevention of harm and offence;
 - (c) ensuring that viewers have a choice of what they watch, how they watch it and how they pay for the services that they choose to interact with; and
 - (d) encouraging and supporting innovation and development of broadcasting across all platforms.

The Provision of Adult Chat and Psychic Channels should be “editorial” content

2. All members of the Association feel that their broadcasts constitute multi-layered entertainment (from watching a programme, to interacting, to purchasing a service) and therefore that their channels should be properly regarded as “editorial”. The vast majority of viewers regard the channels as entertainment and only a small proportion actually interact by “chatting” with the presenters on line.
3. Hard data as to the overall audience for these channels is difficult to provide. The audience data available for BARB-wired channels do not extend to the channels provided by the members of the Association as BARB monitors channels for the purposes of measuring audiences for traditional spot advertising channels. One of our members, however, Cellcast, used to purchase air-time from BARB-wired channels. At that time, Cellcast’s audience data was broadly comparable to the audience data recorded for channels with a similarly adult content (e.g. Playboy) whose business model is based on traditional spot-advertising funding. The members of the Association are presently collating data to substantiate the statement that overall the audience for their adult chat channels in particular compares with the audience for BARB-wired channels with an adult content and will send these to Ofcom as soon as possible.
4. In support of the views expressed above, Ofcom’s own research states that;

“.. the minority of viewers of [adult] chat services.. actively participate, with the majority of viewers choosing just to watch the program.”⁴

*“There is an indication that less than half of regular viewers of **psychic** have called in.”⁵*

These conclusions are broadly in line with Ofcom’s research into quiz TV;

“It is ..clear that the proportion of viewers who choose to participate is relatively small. ..research by ICSTIS ...suggested that while around 38% of those that watch quiz TV had actually taken part at some point, only 6% did so often. Similarly, Optimistic Entertainment’s [evidence] indicated that only 12-15% of audience participated, the rest were content to just watch while ITV, in its evidence, suggested that around a fifth of viewers actually participated in quizzes.”⁶

5. Taking as an example the BARB data for the viewers of Playboy, then, Playboy has about 150,000 viewers per night, which the members of the Association consider is comparable to the size of the audience for each of their channels too. Of a total audience per night of about 150,000 viewers, the members of the Association record on average 1,000 unique callers per night, i.e. less than 10% of viewers actually do interact with the channels and make premium rate service calls showing that the vast majority of viewers enjoy the entertainment value of watching the channels *per se*. Indeed Ofcom’s own research provides evidence of this entertainment value;

“‘Babe’ was seen by its viewers as titillating or indeed arousing, whether there was telephone participation or not, and was also felt to offer entertainment, humour or company “⁷ and viewers expressed “some concern if PTV were to be subjected to what they saw as “nanny state” intervention”⁸.

6. Indeed, the members of the Association consider that they provide a new multilayered form of entertainment, which viewers clearly value and choose to watch⁹ Viewers are in no way misled as to either the nature of what they are watching or the fact that they are

⁴ Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial, dated 24 July 2007, paragraph A7.47

⁵ *Ibid*, paragraph 5.28

⁶ *Ibid*, paragraph A7.47

⁷ An independent report on Participation TV – quizzes, adult chat and psychic readings: Viewer research summary prepared by Essential, paragraph 5.2.4

⁸ *Ibid*, paragraph 7.1.2

⁹ The “adult” section of the Sky EPG (reproduced in Annex 3) is the section with the most channels after the “general entertainment” section; this is a popular form of entertainment which viewers want to watch.

purchasing a service if they choose to telephone. Indeed, Ofcom appears to acknowledge that being misled is not an issue.

7. Having said this, any regulatory environment meeting the objectives listed in point 1 above will be welcome by the Association members, regardless of classifications. Provided that they can continue to operate, and that they do not find themselves at a disadvantage as compared to broadcasters from other Member States of the European Union, on the one hand; and providers of other adult channels and channels with adult content which are shown on free-to-air channels, on the other hand, the members of the Association would not be concerned about whether they are classified as “editorial”. Indeed, the members of the Association could consider being classified as “advertising”, provided that the advertising rules can meet their requirements.
8. In particular, it would be absurd if a reclassification led to the members becoming unable to operate their channels. The purpose of any reclassification is to ensure that viewers are not misled. This is the rationale under the Television Without Frontiers Directive, Council Directive 89/552 (“the TWF Directive”) and the rationale behind the ECJ Judgment. There is no logical reason, in the absence of any evidence that consumers are being misled, why psychic channels should be banned; adult chat channels encrypted and quiz shows forced off-air. The Opinion enclosed at Annex 1 and referred to in Part 1 of this reply make it clear why it would be illegal for Ofcom to conclude that the members need to cease to operate due to a reclassification exercise. In this Part 2, the Association explains why, dedicated PTV channels were to be reclassified, then a thorough review of the BCAP Code will be necessary.
9. It is the view of the Association that it would be disproportionate and discriminatory (and therefore ultimately illegal) for Ofcom to insist on blind compliance with the BCAP Code. In the absence of genuine consumer complaints, the members of the Association owe it to their shareholders, employees, production teams and customers to ensure that any changes to the status quo are made for a reason and are properly considered, in the public interest.
10. The members acknowledge that Ofcom has sufficient information to know that in other Member States of the European Union there is no ban on psychic channels and no need to encrypt adult-chat. They do not therefore propose to provide evidence of this, unless asked to do so. They would limit themselves to observe here that under the TWF Directive any broadcaster licensed to operate in any member State may broadcast into any other Member State. Domestic regulation can therefore lead to a disadvantage for the

members of a sector operating in the UK. For example, by unilaterally restricting PRS for UK operators when European broadcasters operating from outside the UK could offer identical services free to air to UK audiences, generating revenues from PRS, credit card or other methods would disadvantage the UK broadcasters.

11. If they have to live with being classified as “advertising”, then the members of the Association consider it essential that the BCAP Code should be revised and proper consideration given to whether BCAP should be the regulator best placed to regulate these channels. This is so especially in light of BCAP’s public pronouncements that they do not consider that a review of the BCAP code should be undertaken to accommodate Participation TV. BCAP has also shown marked reluctance to becoming the regulator for the dedicated Participation TV sector.¹⁰
12. As indicated in the Opinion, Ofcom has ultimate responsibility for the way in which the BCAP Code operates. Broadly, the duty to regulate broadcast advertising was vested in Ofcom under s. 319 of the Communications Act 2003. In May 2004 Ofcom entered into a non-binding Memorandum of Understanding between the ASA, BCAP and the Broadcast Advertising Standards Board of Finance Limited 2004 with a view to contracting out the regulation of broadcast advertising and the financing of BCAP. Ofcom remains the back-stop regulator of broadcast advertising.
13. The members would welcome the opportunity to engage in a proper discussion both about the appropriateness of BCAP as the regulatory body for their industry and the provisions of the BCAP Code generally. Due to the current membership of the Association, mostly made up of providers of psychic and adult chat channels, the main and most immediate concerns for the members, when faced with a possible re-classification, is on those provisions in the BCAP Code that threaten their very survival. This is the reason why in the paragraphs below the focus will be on two main aspects of the BCAP Code that require urgent attention, namely the ban on psychic channels and mandatory encryption of adult chat channels. Other aspects of the BCAP Code will almost certainly also require a review and the members will welcome the opportunity to discuss all aspects of the BCAP Code with Ofcom. As more particularly indicated below, the arguments against encryption for adult chat channels apply equally to psychic channels. It would not be possible for psychic channels to survive encrypted, in the same way in which it would not be possible for adult chat channels to survive.

¹⁰ ASA: Participation TV: How should it be regulated? Response to pre-consultation Issues Paper, dated 31 January 2007.

The BCAP Code

The BCAP Code is out of date

14. The BCAP Code has its genesis in the ASA CAP Code which was first devised in 1961 (long before the UK even joined the European Union). It does not appear that the BCAP Code properly reflects the underlying rationale in the TWF Directive with which this consultation is concerned, namely that the purpose of the separation principle should be to avoid a situation where people are being misled.
15. Ofcom is very aware that:
 - 15.1 Convergence means that traditional ideas of content being "pushed" at viewers on TV are not tenable when viewers have a choice of hundreds of channels and a choice to access content on the internet. Broadcasters are used to co-existing with the relatively relaxed regime for print media but new technology, and specifically the growth of video on the web driven by increased broadband penetration and the growth of 3G, is providing consumers with many choices for video driven entertainment and richer opportunities to interact with programming. The web environment makes distinctions between editorial, advertising and 'teleshopping' content increasingly irrelevant. The members understand that the distinction between "advertising" and "editorial" is a consequence of European legislation, but it is an unfortunate quirk of the system in the UK that being classified as "advertising" means draconian rules that completely outlaw certain types of programmes. There is no level playing field for content providers across all media.
 - 15.2 Participation TV has evolved as a new business model, in a context in which traditional advertising revenue is falling. Broadcasters traditionally generated revenues from spot advertising. The internet has, last month, surpassed TV in terms of advertising revenues. Broadcasters need to find new ways to finance their programming. A significant section of the viewing public enjoys and wants to engage with participation TV programming. The regulatory environment must encourage the creation and experimentation in new and innovative broadcast models.
16. The members believe that any rules in the BCAP Code that may become applicable to them should ensure that there is total transparency; that viewers are not misled in any way and that a level playing field is properly maintained amongst the different platforms. Any concerns to do with "harm and offence" issues (which in any event are not a concern

for the purposes of this consultation) can be dealt with under rules not dissimilar from the rules under the Broadcasting Code.

The Inexplicable Ban on Psychic Channels

17. Psychic channels have a high entertainment / editorial content and therefore it is even more important to ensure that they are not hastily re-classified as “advertising” without a proper understanding of the strength of content they propose.
18. Ofcom’s own research makes numerous references to their finding that viewers consider the content of these channels to be “very engaging”, “uplifting”, “inspiring”, “insightful” and “informative” as well as reports that the channels provide “vicarious pleasure” and are “entertaining”. The research also clearly reflects the viewer’s reliance on these channels that play “an important role in helping them consider problems and challenges in their lives” and for “support, guidance and reassurance”.
19. In any event, the members of the Association have looked in vain for the reasoning that must have been put forward as a justification for a total ban (in the UK only) for psychic channels under the BCAP Code (i.e. when these would be classified as “advertising” but not when these are considered “editorial”). The members consider that in the absence of any complaints by viewers or any evidence that psychic channels lead to “harm and offence” type of situations, it would be disproportionate (even irrational) to impose a total ban on psychic channels under the BCAP Code.
20. For the avoidance of doubt, the members of the Association who provide psychic content would like to stress that the arguments developed below as to why “encryption” is not an option for *adult chat* channels that become subject to a re-classification, apply equally to *psychic* channels. To amend the BCAP Code so as to allow the provision of psychic channels but only when these are encrypted would not be a solution.

Encryption

There is no reason why any reclassification as “advertising” should lead to encryption.

21. The members are aware that Ofcom has, in the past, considered that by broadcasting under the “editorial” banner, adult chat channels might have been “circumventing” the

encryption provisions in the BCAP Code. Indeed, this view is expressed in the consultation documents.

22. What is the purpose of requiring encryption under the BCAP Code? There seems to be no logical connection between requiring encryption and avoiding a situation where people are being misled. If something is misleading in a programme, then people watching that programme behind encryption will still be misled. Encryption in the BCAP Code must be aimed at a different purpose, namely, possibly, dealing with “harm and offence” issues, in a moral sense. If this is the case, there is no reason to require encryption as a result of a reclassification exercise whose purpose it is to ensure that viewers are not misled.
23. Can there be any logical reason why a channel listed under the “adult” section of the EPG, which relies for its funding on PRS, should be classified as “advertising” (and *therefore* should be encrypted) when terrestrial channels under the general “entertainment” section that use nudity and even very graphic sex scenes in programming to drive ratings and advertising are not? The answer is “no”. Both types of channels are driven by commercial motivations; the only difference is that, in the first case, the link between viewer and income generated is more immediate (and a whole system of tight regulation of PRS enforced by a dedicated regulator, PhonepayPlus is in place, for consumer protection) than in the second case, which relies on traditional spot advertising funding.
24. It is important to understand the purpose of encryption. Encryption is a billing device (it was not designed as a way to control content strength).¹¹ The point of conditional access (and encryption) is to facilitate access for payment in the context where what is offered for purchase is video content (be it Sports, Movies or Adult, on a periodic subscription or as a Pay Per View service, available for a one-off payment, over and above the price of any subscription). Some harder adult channels are encrypted as a way to generate income (and the members of the Association feel strongly that these channels would be the main beneficiaries if the comparatively tame adult chat channels were to be required to be encrypted (and likely stop operations), with the result that viewers will be pushed towards more explicit content, less choice and much higher costs). For example, Ofcom will know that Sky has an interest in six encrypted adult channels and, in addition, derives income from every single ‘buy’ or transaction conducted by all encrypted adult channels. Free to air adult chat channels do not need to encrypt since their business model is not predicated on charging viewers to watch (the charge is made for interaction and for

¹¹ Every Sky subscriber has the ability to pin protect the Adult section if they do not wish other members of their household (such as children) to have access to it.

participation, so arguably the viewer is better off as he or she only pays when they decide to participate, having watched the channel (by way of example, a customer that purchases a Pay Per View service has no option but to purchase it “blind”, albeit that they would have seen advertising)).

25. If, in the hypothesis, Ofcom believed that encryption should be used to control content strength then of course there would be no reason to confine an encryption requirement to those channels classified as “advertising”, in fact encryption as a tool to deal with “harm and offence” already exists in the Broadcasting Code, at paragraph 1.24. In any event, it is interesting to consider that the following channels broadcast adult content after the watershed, night after night, free-to-air, not encrypted and in the general entertainment section of the EPG:
- (a) Channel 112 Living
 - (b) channel 113 Living + 1
 - (c) channel 114 Living 2
 - (d) 121 Virgin 1
 - (e) 122 virgin 1+1
 - (f) 123 Bravo
 - (g) 124 Bravo +1
 - (h) 129 sci fi
 - (i) 130 Sci fi +1
 - (j) 154 Bravo 2
 - (k) 184 Men and Motors
26. At the risk of being obvious, viewers zapping through the adult section of the EPG are seeking adult content. The content that is currently broadcast is regulated under the existing Broadcasting Code to meet standards generally accepted across all media. The industry has been successfully operating for over eight years with few complaints. Ofcom has indicated that they had concerns about the strength of content in the past (in or about 2006) but, since then, and following welcome clarification from Ofcom, the industry has taken action and the members firmly believe that the core broadcasters in this sector have taken, or are taking, the necessary steps to ensure compliance.
27. The members of the Association are also concerned that some competitors which have chosen to operate behind encryption may be complaining and lobbying to have their channels equally encrypted for anti-competitive reasons.

Encryption is not technically feasible

28. In this section, we deal with three aspects relating to the technical feasibility of encryption which are all important and require in the members' view proper consideration. These aspects are;
- 28.1 that encryption is not available on all platforms (see paragraphs 30 and following). Further, that encryption cannot be provided when programmes are shown on third party channels on a segmented basis; that is, encryption is only available for a channel in its entirety.
- 28.2 if by "encryption" Ofcom intends the process of unscrambling the signal for conditional access to channels (as opposed to providing a means to ensure parental control), then this is something theoretically available on Sky as a platform (but not on other platforms). Sky channels are encrypted through the use of so-called *box office encryption technology*. This has a number of advantages over the standard encryption method which is commonly made available to third party channels in direct competition with Sky channels through a company called MGt (see paragraphs 31 and following); and
- 28.3 one particular aspect of the standard encryption method, which makes it unfeasible for the members of the Association, is that MGt insists on obtaining credit card and billing addresses for all customers wishing to watch the encrypted programme. The members of the Association cannot allow confidential information of this type to be disclosed to MGt, a recognised supplier to Sky.
29. The members have been asked to point out to Ofcom any distinguishing features that would make their individual cases different. Having checked with the members, no such individual features have been identified and therefore the following is a generally applicable statement of the situation applicable to each and every member (including the psychic content provided by members, were this to be required to be encrypted).

Encryption or conditional access services are platform-related and not universally available across all broadcast media.

- 30 *Free to air.* It is important to note that viewers do not need to use a Sky or Freesat box to receive and view free-to-air signals. Other platforms, such as cable Freeview, Freesat and free to air satellite broadcast (where viewers tune directly to the satellite frequency

without an EPG) do not provide any form of conditional access. Because of the lack of a system, or path for encryption, it would be prohibitively expensive and logistically complicated for single broadcasters to develop and implement their own systems on a channel by channel basis.

31 *Mobile.* The members believe that at present encryption on platforms such as mobile television, may not even be available. The technology allowing for encryption on mobile television would be an entirely separate new technology.

32. *Sky.* The Sky digital platform provides two forms of restricted access.

(a) Parental control – this uses a PIN to restrict access to a channel EPG. It does not encrypt the channel in any way.

(b) The conditional access template enables channel operators to require viewers to pay to view content on either a “per view” or “per period” basis – this does encrypt the channel and, as seen above, encryption is operated for commercial purposes. Sky, and its associated companies involved in the provision of conditional access on the Sky digital platform generate revenues via a revenue share from the payments made to view content.

Encryption could only be an option on the Sky digital platform, but in practice it is not.

33. One point that may not be immediately obvious is that there is a difference between;

33.1 *box office encryption technology* – when this is available, a Sky subscriber gains access to a third party (non-Sky) channel such as an adult chat channel by inserting his or her usual PIN number, used in all cases, including for encrypted football matches, films and adult content. There is no need to provide separate verification for each viewer (including the address of each user) and the user does not need to remember a separate PIN number or to enter his or her credit card details in order to access a specific channel.

33.2 *standard encryption* - a channel-by-channel encryption service is available, through a company called MGt, a recognised supplier to Sky. In order for a channel to be encrypted, a so-called “conditional access template” is created, at a cost of about £100k. When the channel is properly encrypted, a viewer will need to submit the details of its credit card in order to gain access. For the purposes of verification, credit card numbers, billing

addresses and names of users of the service need to be provided. As seen above, the members of the Association are understandably reluctant to disclose these details. A minimum amount for the use of the services is then charged. The charges are published on Sky.com's website (under Sky Corporate).

34. It should be clear from the above that the standard encryption process leads to extra hurdles imposed on viewers. The Association's members consider that their audience would not be prepared to withstand such hurdles. The income of adult-chat channels is dependent on casual audience and, although quantification is difficult, the members consider that to adopt the standard encryption process would lead to a reduction in revenue of as much as 90%. Indeed, one member of the Association that was able to obtain from Sky access to box office encryption technology for its encrypted channels found that revenue almost trebled as a direct result of the change.
35. Access to box office encryption is however unfortunately being phased out for Sky's competitors in the members' experience . The only member that broadcasts on an encrypted channel, Sport TV, uses box office encryption. The contract with Sky will shortly run out and Sport TV is concerned about renewal. The concern is based on Sport TV's experience with another channel that used to be encrypted, namely SportXXXbabes. At the time when Sport TV attempted a renegotiation of that contract it became evident that Sky is phasing out availability of box office encryption for third party content providers which are providing channels in direct competition with Sky. When Sky did not renew the contract, Sport TV changed the content of SportXXXbabes and now shows it on a free to air basis.
36. In view of these difficulties, and in an effort to see whether compliance with the BCAP Code may be feasible, the members have been exploring with Sky the possibility to introduce a single PIN code for the whole of the adult entertainment section. Effectively, this would have meant that viewers would still have a separate PIN number but at least they could have used it to enter the section once and for all and then be allowed to browse and zap from channel to channel. As Ofcom will recall, at a meeting with Ofcom on 20 December 2007, this was explained to Chris Banatvala and Trevor Barnes, who indicated that it would be a matter for commercial discussions with Sky whether a single PIN for the adult section could be provided. Unfortunately this proved commercially unattractive for Sky; the members consider that the fact that they are in competition with Sky's encrypted channels (see paragraph 24 above), might have been a factor. Further, the proposal could have led to an overall change to the system of conditional access templates and a loss of revenue for Sky.

Is there a good reason to distinguish non-dedicated and dedicated Participation TV?

37. The members of the Association consider that their channels constitute “Participation TV” *tout court* and would not distinguish between voting on X factor, Britain’s Got Talent, Most Haunted, Saturday Kitchen, Quiz Call, ITV Bingo Babe chat and psychic programming. All are examples of the new forms of the contemporary editorial programming that generate significant revenues by PRS.
38. The members note with some disappointment that there seems to be a conspicuous lack of research into “non-dedicated” PTV. This is surprising in view of recent developments and the fact that PTV in mainstream television has generated the overwhelming majority of complaints and has undoubtedly caused the most consumer harm. The absence of research into this area of PTV means that both Ofcom and consumers are none-the-wiser as to the sheer level of activity, revenues generated and potential for harm in this sector.
39. It is clear that non-dedicated PTV programmes generate revenue and involve repeated ‘selling messages’ to a captive audience and during programming scheduled and designed to appeal to the mass audience, including:
 - 39.1 Repeated messages to call premium numbers to vote for contestants / keep them in the competition, including statements which create a sense of urgency (e.g. “lines close in one minute”).
 - 39.2 Pleading statements by the contestants and emotional representations, including crying and expressing how important/ potentially life-changing the opportunity is etc.
 - 39.3 References to donations to charity, creating a sense of altruism and ‘softening’ the perception of the costs of participation and the true commercial nature of the service.
 - 39.4 On and off-air media activity, including press and internet coverage, which comprise powerful messages by third parties, such as newspaper campaigns to evict unpopular individuals, emotive and persuasive language, sensationalism and scandal.
 - 39.5 Coverage in the news and linked programming.
 - 39.6 The editorial content is designed to intensify the emotional experience for the viewer and to encourage votes - viewers vote each week in support their favourite and to ensure they ‘stay in’ and increase their chances of success.
40. Such formats rely heavily on viewer participation and the use of premium rate services - viewers decide who stays, who is evicted and ultimately who wins, and they can only do

this by paying to participate. We find it difficult to see how such services can justifiably be excluded from any further analysis of whether they too should be re-classified as “advertising”.