

Participation TV Part 2: keeping advertising separate from editorial

Submission by SBS Broadcasting Networks Limited

1. Introduction

- 1.1 SBS Broadcasting Networks Limited operates 8 channels from the UK. The channels are broadcast throughout Scandinavia. SBS is part of the ProSiebenSat.1 broadcasting group. The ProSiebenSat.1 Group broadcasts 26 commercial TV stations, 24 premium Pay TV channels and 22 radio networks in 13 European countries and consequently is one of Europe's leading pan-European broadcasting groups.

2. PRS Under the Broadcasting Code

- 2.1 We have previously commented on Ofcom's July 2007 discussion paper on Participation TV together with Part 1 of the Consultation on Participation TV. Therefore we do not intend to repeat any of our previous submissions other than in relation to the proposed wording of Rule 10.12 of the Broadcast Code. We also accept that the judgment of the European Court of Justice in the *ORF* case means that certain types of quiz programming might constitute teleshopping if it involves "a real offer of services" and satisfies the other criteria set down by the ECJ in that case.

- 2.2 In the Part 2 consultation document, Ofcom has asked for specific comments on the drafting of the proposed amendments to the Broadcasting Code set out in Section 4 of that document. We are concerned with certain of the revisions made to Clauses 10.10, 10.11 and 10.12 of the Broadcast Code. We accept following on from the ECJ case, that there is now a fine line between PRS adding to the editorial content and viewer enjoyment of a programme and overstepping that boundary and becoming in effect a direct offer of the PRS service and so, teleshopping. Whilst we have kept our suggested drafting changes to a minimum in relation to the revision of Rules 10.10 and 10.11, we believe that our proposed changes accurately reflect the position adopted by the ECJ and also do not violate the proposed policy adopted by Ofcom concerning the use of premium rate services in "editorial" programming.

- 2.3 Our primary concern relates to the use of PRS in relation to game shows like "Who Wants to be a Millionaire". In Paragraph 3.33 of the Consultation, Ofcom recognises "... both the natural desire of audiences to communicate with broadcasters and the universal nature of telephony (including mobile voice, sms and mns) as a public communications medium". In our view, an audience quiz or game promoted as part of a game show like "Millionaire" remains an integral part of the viewing experience for many viewers who either may not wish to be a studio contestant or even if they would like to participate directly may not have a realistic prospect of doing so. However, for premium rate services to be used in such a programme the first bullet point of Rule 10.10 requires two separate conditions to be satisfied. These are that the PRS must be:

- (a) directly derived from the particular programme; **and**

(Condition 1)

- (b) enable viewers or listeners to participate **directly** in or contribute **directly** to the editorial content of the programme.

(Condition 2)

- 2.4 In our view, Condition 1 is mandatory. An audience quiz or competition run in conjunction with a programme like "Millionaire" must be directly derived from that programme. However, it could be argued that for a viewer to "participate directly" in a programme, the viewer would actually need to participate in the questions being asked to the studio contestant. Whilst this is a possible type of game, an alternative call in game could equally be enjoyable for viewers whereby they compete for prizes to answer tonight's "million dollar question" or something similar. Whilst the first mentioned type of call in game would satisfy Condition 2 and enable viewers to participate directly or contribute directly to the editorial content of the programme, the second type of call in game may not satisfy the strict wording of Condition 2. We believe that making Condition 2 mandatory exceeds the requirements prescribed by the ECJ. This is despite the fact that the latter type of quiz we have described is obviously part of the editorial content and gives enjoyment to many of the viewers who watch a programme such as "Millionaire" as it gives them a "real connection" to the programme.
- 2.5 In our view, the easiest way to deal with this issue would be to make Condition 2 effectively non-mandatory by inserting the word "or" next to "and" at the end of Condition 1. Alternatively, the reference in Condition 2 to "directly" could be removed or supplemented by the addition of the words "or indirectly". Therefore in such circumstance, viewers who participate in call in games described above as part of a programme like "Millionaire" are participating in the programme albeit perhaps not "directly". Finally, if Ofcom is not willing to amend the Code itself then at the very least, the Guidance should be amended to explain in greater detail where the use of PRS will satisfy Condition 2. It is unfair that broadcasters are, in effect, required to guess when the use of premium rate services may be considered to be "direct" and when it is not. Especially now that Ofcom has made it clear that the use of PRS is an area where there is no margin for error in compliance by broadcasters and so we believe clarity is essential on behalf of the regulator.
- 2.6 If our latter drafting suggestion is adopted, then we believe the same amendment needs to be made to the second bullet point of Rule 10.11.

3. Rule 10.12

- 3.1 We believe that in Rule 10.12, it should be made clear that the requirement to observe the PhonepayPlus Code only applies where the programme is received in the UK. This is an issue we have addressed previously with Ofcom. Our channels are not received in the UK and therefore if we use PRS in our programming, our primary obligation and that of our PRS service provider would be to comply with the local PRS regulations in the country of destination and not with the PhonepayPlus Code. In his reply of 24 April 2008 on this issue, John Stables agreed that Ofcom would not expect us to comply with the PhonepayPlus Code where the premium rate services that are used originate and terminate outside the UK.
- 3.2 We attach a copy of the relevant rules marked up with our suggested drafting amendments.

SBS Broadcasting Networks Limited

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