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21<sup>st</sup> May 2008

**OFCOM Consultation**  
**Participation TV part 2**

**Keeping advertising separate from editorial**

Dear Ms Matthews

Please accept this paper as the formal response to the above consultation on behalf of WIN plc and its group companies.

[www.winplc.com](http://www.winplc.com)

WIN are a dynamic enabler of entertainment, information and interaction services. WIN help leading content owners, mobile operators, corporate enterprises and media & entertainment corporations engage customers, create brand loyalty, maximise revenues and reduce costs.

Our services, whilst mobile centric, embrace mobile, fixed telephony, internet, broadcast and on-demand technologies.

WIN offer a complete solution from consultation and concept, through to design, development, implementation, network connectivity and on-going service and support.

Following the PTV consultation of 2007 OFCOM rightly concluded that additional rules would be required in order to clarify the use of premium rate in broadcast programming. The events of 2007 exposed an evident lack of transparency and effectiveness of existing regulation. The burden of regulation in respect of premium rate services has traditionally vested with the technology partner or service provider pursuant to the Code of Practice of Phonepay Plus. Clearly premium rate regulation of the broadcasters under the Phonepay Plus Code was insufficient and that additional regulation was required at the point of interaction between the consumer and the broadcaster.

The recent changes to the broadcasters' licences have bridged this gap and firmly placed the direct responsibility for consumer interaction with the broadcasters themselves. This is entirely right.

The industry has moved on significantly in the past twelve months. Both technical processes and service management have greatly improved. Efforts continue in respect of cross industry best technical practice codes and improved price transparency initiatives which will further enhance consumers' experiences of interactive media and improve levels of confidence. WIN is a leading participant in respect of these endeavours.

## PTV 2

OFCOM's consultation PTV part 2 sets out proposals in respect of the separation of advertising and editorial content. In addition OFCOM has elected to consider the impact of the ECJ judgement issued on 18<sup>th</sup> October 2007. WIN notes OFCOM's belief in terms of the interpretation of that judgement.

WIN is sympathetic of the need to provide clarity in the broadcast environment. As the technology has converged so have the regulations and regulators. The environment is confused and does not currently favour investment or employment stability.

WIN recognises that OFCOM has a responsibility to regulate content genre in the interests of the consumer and WIN has few concerns with this in substance (particularly in relation to the affected adult and psychic services). However in terms of future interactive services WIN believes that OFCOM is unnecessarily restricting this market by imposing constraints that are beyond the ECJ ruling and are unnecessary to achieve its immediate aims.

In considering the proposed new rules WIN concludes the following:

- 1. There is a need for clarity between content that is editorial or purely advertising however the new rules as proposed are overly restrictive and will inhibit innovation.**

As traditional forms of 'spot' advertising decline there is a need to fund broadcasting through alternative models. PRS has contributed significantly in the development of such new models bringing with it a richer, more dynamic consumer experience. It should be expected that with increased convergence of technology interactivity across technology platforms will increase as will the funding models to sustain them.

The ECJ ruling was based on specific service content, funded specifically by PRS and concluded (in accordance with the test extracted from the case) that that content amounted to advertising. OFCOM has further concluded that there are analogous scenarios in the UK market that should be similarly classified. By conducting such analysis the adult and psychic content become defined as

advertising and therefore fall within the BCAP Code and are therefore now non-compliant and prohibited.

The non-compliance is the by product of the classification process which achieves OFCOM's desired result.

Subject to paragraph 4 below, WIN does not need to comment further on the effect of this classification on adult and psychic services. However WIN does challenge whether it is right to categorise content purely based on its funding model and believes that to do so will inhibit further convergence and innovation. It will serve to polarise broadcasting, isolate services consumers enjoy and stifle future investment. WIN believes that OFCOM's content classifications and management concerns can be achieved through other legitimate and effective means such as labelling and encryption, which would in turn allow content and advertising to co-exist along side each other in readily identifiable formats. This would facilitate financial flexibility encouraging investment in and support of the broadcast industry.

**2. The new rules, by permitting interactivity funded only through premium rate telephony or revenue share telephony is contrary to the basic principle of technical neutrality and potentially anti-competitive.**

For the time being PRS is a convenient model to allow micro-payments to be made in return for media interactivity or content. Again converged technology environments favour the adoption of cross play interactivity. It is not unrealistic to assume that branded broadcast 'clubs' may arise whereby in return for a monthly subscription a consumer may experience an 'all you can eat' media environment; downloading TV related games from the internet, interacting with TV votes and uploading user generated content from a laptop, camera or phone, for example. This interactivity may more appropriately be paid for via credit cards or pre-paid accounts, on a fixed monthly basis.

Whilst WIN understands the apparent need for OFCOM to mandate PRS as the payment mechanism for interactivity in order for certain content to be captured by the ECJ ruling, WIN believes it is wrong and anticompetitive to prohibit the use of other financing models. Such mandatory requirement is also beyond the scope of the ECJ ruling.

Rules concerning broadcasting should not prohibit the broader monetisation of consumer media products or capabilities, nor should they prevent the participation of other financial payment providers.

**3. PRS is simply a micro- payment mechanism.**

The status of PRS is confused in this document. The document interchangeably refers to PRS as a payment mechanism, a product, and in places, a service. PRS is not a product to be promoted in its own right, but a payment mechanism. In

addition PRS functionality employed within a programme is not a source of consumer harm per se - provided the PRS is appropriately labelled, transparently priced and delivers what it states it will deliver. This is true of any payment mechanism. This supports the requirements of the TWF Directive.

The recent improvements made in mainstream broadcasting demonstrate the benefits that transparency brings. This will only continue to improve. The viability of PRS usage in broadcasting will ultimately be dependent on the consumers. Consumer choice will prevail and should be allowed to prevail. Mandating PRS as a sole payment mechanism precludes consumer choice and competition.

**4. The new rules as proposed go further than those envisaged by OFCOM in 2007. No decisions should be made without a revised full and detailed impact assessment.**

The immediate application of the new rules would render adult and Psychic TV teleshopping and therefore governed by the BCAP rules, which in turn would render such programming non-compliant.

Similarly certain quiz TV programmes would become untenable. Given that the rule changes are beyond those originally anticipated by OFCOM and the impact is widely considered to be material (in the order of £60 million pounds) OFCOM should suspend implementation until a full impact assessment has been conducted and the measures considered against its obligation to respond proportionately.

**5. There is a need for clarity in respect of regulatory jurisdiction.**

WIN remains concerned that the new rules confuse the regulation of PRS further by introducing the BCAP and ASA into this environment. Clarity is needed as to the role that they, OFCOM and Phonepay Plus would have in terms of enforcement. Similarly which regulator has the requisite skill sets to assess programmes. The ASA consider broadly spot advertising and are not well placed to review editorial or PRS. PPP review PRS but rarely in the context of broadcast editorial. Or would such matters be referred to OFCOM for determination?

## Consultation Questions

### *Question 1*

*Do you have any comments on the drafting of the proposed amendments to the Broadcasting Code set out in Section 4? Please provide drafting suggestions where appropriate.*

Clause 10.9 should be deleted from the revision on the basis that it is inappropriate an unnecessary (to achieve content management) to mandate a single payment mechanism for funding Interactive television services.

10.10 should be revised to read “Where Premium Rate Services or other telephony services based on similar revenue-sharing arrangements are used in programmes, they may only be so used where;

- They are both directly...etc”

There is scope to revise this section 10 to include all payment mechanisms for interactive services, not just to ‘where PRS is used’. The statements themselves are valid, the payment mechanism is not sufficiently technically neutral. The method of payment would then be the broadcasters choice according to show format and likely audience etc.

### *Question 2*

*Do you have any comments on the draft explanatory guidance set out in Section 4? Please provide drafting suggestions where appropriate.*

The note in respect of 10.9 is unnecessary

### *Question 3*

*Do you agree that the proposed rules should apply to radio as well as to Television?*

WIN supports regulation that is technically neutral, facilitates convergence and promotes competition. Under those principles it is entirely right that regulation regarding broadcasting should be applicable to all broadcasting irrespective of technology or platform, so yes it should apply equally to radio.

WIN appreciates the opportunity to express its opinions on this pertinent matter and looks forward to the conclusion of the consultation. Please do not hesitate to contact me if you require further clarification of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sally Weatherall'. The signature is written in a cursive, flowing style with a large initial 'S'.

Sally Weatherall  
Commercial Director  
WIN plc