



Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial

A consultation paper examining how Participation TV
should be regulated

Consultation

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Section 1

Summary

Objectives of the consultation

- 1.1 UK television has a long-established tradition of participation by audiences at home. Viewers enjoy taking part in programmes and having an opportunity to win a competition, influence the outcome of a programme or otherwise contribute to the programme. Increasingly, audience participation involves premium rate telephony services ('PRS'). This raises two separate and important issues:
- Protecting viewers and consumers across all types of television content that encourages viewers to take part ('Participation TV' or 'PTV'). This is of particular significance in view of the number of serious compliance and editorial failures in PTV that have recently come to light, most notably in mainstream programming broadcast by the public service broadcasters;
 - Ensuring that advertising is kept separate from programme content ('editorial') in accordance with European broadcasting legislation and UK regulation. This is a particular issue in certain types of programmes, blocks of programmes and indeed entire channels (referred to in this consultation paper as 'dedicated PTV'), rather than in mainstream programming.
- 1.2 It is essential therefore to consider how PTV should best be regulated, with a view to finding the right balance between protecting viewers and protecting consumers, ensuring consistency with the legal framework and respecting broadcasters' right to freedom of expression.

Protecting viewers and consumers

- 1.3 Recent events have raised serious concerns about the integrity of programmes using PRS. Viewers' trust in these programmes has been damaged. Therefore, earlier this year, Ofcom commissioned an inquiry ('the Inquiry'), led by a member of the Ofcom Content Board, Richard Ayre, which was charged with making recommendations on actions needed to restore confidence and trust in the use of PRS by television broadcasters. The Inquiry is now complete and has made a series of recommendations to Ofcom intended to ensure that audiences, including those who choose to participate, are adequately protected. The published version of the Inquiry's report is available at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/>
- 1.4 The Inquiry's key recommendation was that broadcasters should be held directly responsible, under their broadcasting licences, for PRS compliance throughout the supply chain. This PTV consultation paper takes this recommendation forward, and proposes a draft licence variation, which would set out new licence obligations for broadcasters.
- 1.5 The Inquiry also recommended that broadcasters be required under the broadcasting licences to undertake an independent third party audit. Ofcom agrees that some form of independent third party verification is essential. This consultation paper therefore considers the option of a prescriptive audit specification and other possible options involving independent verification, and seeks views from stakeholders. Whilst the

Inquiry focussed upon television, Ofcom and ICSTIS¹, the regulator for the PRS industry, are currently investigating a number of cases involving PRS on radio and Ofcom believes that radio audiences should also be protected against failures involving PRS. Ofcom therefore proposes that the licence variation set out in this document should apply to both television and radio.

- 1.6 It should be noted here that ICSTIS has recently consulted on a prior permission regime for PRS used in TV and radio programmes. Ofcom and ICSTIS have agreed that, in the light of Ofcom's consultation on PTV, it would be premature for ICSTIS to form any conclusions about its recent consultation. Ofcom and ICSTIS have further agreed to assess the responses to ICSTIS in the light of the PTV consultation responses, and to work together to introduce a clear and effective regulatory framework which provides clarity and certainty to all stakeholders.

Separation of advertising from editorial

- 1.7 A fundamental principle of European broadcasting legislation is that advertising and editorial must be kept separate ('the separation principle')². However, dedicated PTV – which in the main is categorised and regulated as editorial - often appears to include characteristics of advertising; for example repeated calls to action, prominent display of PRS numbers, and promotion of services which are not clearly connected to editorial content. This raises questions as to how such content should be appropriately regulated: for example, should it remain categorised as editorial and subject to Ofcom's Broadcasting Code, which sets standards for programmes, or should it instead be categorised as advertising and subject to the relevant regulation, in particular the BCAP Television Advertising Standards Code ('the BCAP Advertising Code')?
- 1.8 The consultation paper sets out four options, ranging from maintaining the status quo to reclassifying dedicated PTV content as teleshopping, a form of advertising. Ofcom is open as to which of these options is the most appropriate and is therefore seeking representations on all of them. However, subject to those representations and further consideration of all the issues set out in this consultation paper, Ofcom's current view is that Option 2 (still editorial but subject to new, tighter rules to ensure appropriate separation) may, on balance, be the most appropriate. That said, stakeholders should also note that there is regulatory activity in this area at European level which, independently of Ofcom's consultation, will also examine whether quiz TV (and possibly other genres of dedicated PTV) is in fact teleshopping or editorial.

¹ Independent Committee for the Supervision of Standards of the Telephone Information Services, to be renamed 'PhonePayPlus'

² See Section 3 for further discussion of the regulatory background. In light of its statutory duties in relation to the setting of standards in broadcasting, Ofcom's Broadcasting Code also requires that the separation principle applies to radio.

Section 2

Introduction

Developments in Participation TV

- 2.1 In this consultation, Ofcom refers to content which encourages viewers to take part, to varying degrees and usually in return for payment, in that content as 'Participation TV' ('PTV'). This consultation brings together two separate issues around the regulation of PTV:
- Protecting viewers and consumers; and
 - Ensuring advertising is kept separate from editorial content.
- 2.2 Terrestrial channels have been using premium rate telephony for twenty years or so, essentially since premium rate charging mechanisms were introduced. For many years, such use was largely confined to phone-in competitions for viewers, typically in genres such as sports and magazine programming, including breakfast television. These viewer competitions were generally simply an element of programming (rather than services in their own right), continuing a long tradition of draws and competitions offered by channels and intended to encourage viewer involvement and loyalty.
- 2.3 However, with the advent of multi-channel television in the early 1990s, premium rate competitions and other premium rate applications, such as viewer voting, started to become more common in programming. Since then, the increase in the capacity available for new channels as a result of digital television coupled with concerns about declining revenues from traditional spot advertising have sharpened the efforts of broadcasters to generate income in an increasingly competitive market and driven the development of new revenue models. Premium rate mechanisms have been prominent among these.
- 2.4 Whilst PTV services currently tend to rely on premium rate telephony, there may be other payment mechanisms, e.g. via credit card, and it is possible that other models may emerge in the future.
- 2.5 PTV ranges from mainstream programming such as reality shows (e.g. *Big Brother*, *The Farm*), game shows (e.g. *Who Wants to be a Millionaire?*, *Deal or No Deal*) and magazine-format programmes (e.g. *This Morning*, *Richard & Judy*) to more niche content focussing on a particular genre. There are now entire programmes, blocks of programmes and indeed channels dedicated to genres predicated – in terms of both the content itself and the funding of that content - on the use of premium rate services, for example adult-themed chat with female presenters ('adult chat TV'), standalone quizzes ('quiz TV') and psychic readings ('psychic TV'). In this consultation we refer to this type of PTV as 'dedicated PTV'.

Background to the consultation

- 2.6 In considering how PTV should be regulated, Ofcom initially focussed on dedicated PTV, rather than mainstream content involving an element of PRS. A fundamental principle of European broadcasting legislation is that advertising and editorial must be kept separate ('the separation principle')³. In 2006, Ofcom became concerned that

³ See Section 3 for further discussion of the regulatory background

certain types of dedicated PTV (in particular, quiz TV, adult chat TV and psychic TV) were becoming increasingly 'commercial' in appearance. They appeared to contain advertising-type characteristics, for example repeated calls to action, prominent display of PRS numbers, and promotion of services which did not clearly contribute to editorial content. However, these services were regulated by Ofcom as editorial. In December 2006, Ofcom published a pre-consultation Issues Paper⁴, which informed stakeholders and the wider public of Ofcom's concerns regarding the challenges to the separation principle presented by dedicated PTV, and sought views and background information to help focus its early thinking.

- 2.7 Separately to these questions under the separation principle (considered in detail later in this consultation paper⁵), the use of PRS in programming has generated serious concerns, amongst viewers and more widely. In January 2007, the Culture Media and Sport Select Committee published its report on the quiz TV sector, which highlighted its concerns about fairness and transparency and recommended that there should be one regulator, in its view Ofcom, taking the lead⁶. Ofcom and ICSTIS, the regulator for the premium rate services industry, produced a joint response in March 2007⁷. Ofcom and ICSTIS have already put in place extensive regulation that addresses many of these concerns about quiz TV.
- 2.8 Then in early 2007, a number of incidents came to light which suggested serious failures (involving viewers being misled) in mainstream television as well as in quiz TV. Broadcasters' integrity was cast into doubt. In addition to investigating individual cases, in March 2007 Ofcom asked Richard Ayre, a non-executive member of the Ofcom Content Board, to lead an inquiry ('the Inquiry') and recommend actions needed to restore confidence and trust in the use of PRS by television broadcasters. This consultation paper now makes proposals for taking forward the Inquiry's key recommendation, and also discusses other steps Ofcom has taken to ensure viewers are protected⁸.

Inputs to the consultation paper

Inquiry into PRS in programmes

- 2.9 Section 4 of this paper considers the need for enhanced consumer protection where viewers and listeners participate in TV and radio content. The Inquiry's key recommendation was that broadcasters should have direct responsibility for the use of PRS in their services and that they should have appropriate obligations written into their broadcasting licences to this effect. Ofcom's Board has formally approved this as a proposal for consultation. Views are therefore specifically being sought both on this proposal and on the form of draft licence variation to implement such a proposal. A redacted version of the Inquiry report was published on 18 July 2007 and is available at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/>

Pre-consultation Issues Paper

- 2.10 We received about 25 responses to the December 2006 Issues Paper from a range of stakeholders. These have been extremely useful. All non-confidential responses

⁴ Available at <http://www.ofcom.org.uk/consult/condocs/participation/participation.pdf>

⁵ See Sections 5 and 6

⁶ Available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/72/7202.htm>

⁷ Available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/428/428.pdf>

⁸ See Section 4

are available on Ofcom's website at <http://www.ofcom.org.uk/consult/condocs/participation/responses/>.

Information request letters

- 2.11 In addition to the general questions raised in the Issues Paper, in January 2007 we wrote formally to providers of dedicated PTV, requesting specific information (in confidence) about their businesses, e.g. corporate structure, revenue details, relationships with premium rate service providers. We received some very useful information which has been of particular relevance to the Impact Assessment in Annex 7.

Market description

- 2.12 In early 2007, we commissioned an independent consultancy, Mediatique, to provide us with a description of the dedicated PTV sector (in terms of key players, size and value of the market, likely developments etc) and also provide financial and other data to help us with the Impact Assessment. Mediatique's report is published as a separate annex and available at: <http://www.ofcom.org.uk/consult/condocs/participationtv/marketoverview.pdf>

Audience research

- 2.13 Ofcom commissioned research from Essential, an independent research agency, to: measure the penetration of viewers of, and callers to, different dedicated PTV genres and profile the viewers; gauge attitudes towards different dedicated PTV genres; and understand where viewers position different dedicated PTV programmes and channels in the broader spectrum of editorial content and advertising. Essential's independent report is published as a separate annex and available at: <http://www.ofcom.org.uk/consult/condocs/participationtv/research>

Content analysis

- 2.14 Ofcom also commissioned The Communications Research Group ('CRG'), an independent research agency, to conduct a piece of content analysis to analyse sample output in order to help Ofcom understand the key features of the dedicated PTV genres of quiz TV, psychic TV and adult chat TV. This work included analysis of the extent of promotional content, including 'calls to action' made by presenters and the display of premium rate phone numbers. CRG's independent report is published as a separate annex and available at: <http://www.ofcom.org.uk/consult/condocs/participationtv/contentanalysis/>
- 2.15 All of the above inputs have been taken into account in preparing this consultation paper and the regulatory options being proposed.

Section 3

Regulatory Background

Ofcom's statutory duties

- 3.1 In discharging its functions under the Communications Act 2003 ('the Act'), Ofcom's principal duty is to further the interests of citizens and consumers⁹. We are required to secure a number of other matters including maintaining a sufficient plurality of providers of different television services¹⁰ and the availability throughout the UK of a wide range of television services¹¹.
- 3.2 As part of its duties in relation to broadcasting, Ofcom is responsible for setting broadcast standards for the content of programmes. The relevant objectives¹² to be secured by these standards include:
- that persons under the age of eighteen are protected;
 - to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material; and
 - to prevent the inclusion of advertising which may be misleading, harmful or offensive.
- 3.3 In setting standards, Ofcom must have regard to a number of matters¹³ including:
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes;
 - the likely size and composition of the potential audience;
 - the likely expectation of the audience as to the nature of a programme's content and the extent to which it can be brought to the attention of potential members of the audience; and
 - the desirability of maintaining the independence of editorial control over programme content.
- 3.4 Ofcom must secure such other standards applicable to particular descriptions of programmes as may be appropriate for securing the above objectives¹⁴. In addition in securing the objectives, Ofcom may include provisions prohibiting advertisements and methods of advertising in particular circumstances¹⁵.
- 3.5 In setting standards Ofcom must take account of its obligations under the Television Without Frontiers ('TWF') Directive¹⁶. Ofcom may include conditions in relation to its

⁹ section 3(1) of the Act

¹⁰ section 3(2)(d)

¹¹ section 3(2)(e)

¹² section 319(2)

¹³ section 319(4)

¹⁴ section 319(5)(b)

¹⁵ section 321(1)(b)

¹⁶ Directive (89/552/EEC) as amended by (97/36/EC)

broadcasting licences (including any television licensable content service or any digital television programme service) for securing compliance with international obligations¹⁷.

The Co-regulatory System of Broadcast Advertising Regulation

- 3.6 The Act gives Ofcom specific duties towards the regulation of advertising. However, whilst Ofcom retains ultimate responsibility for such regulation, it has entered into a co-regulatory arrangement with the Advertising Standards Authority ('ASA') (enabled by a statutory instrument¹⁸ and a Memorandum of Understanding) under which the ASA is given responsibility for operating the broadcasting advertising standards system for all types of broadcast advertising, including teleshopping and self-promotional channels. (The ASA had previously been responsible for non-broadcast advertising alone.¹⁹) Ownership of the codes, guidance notes and other rules also passed to the Broadcast Committee of Advertising Practice ('BCAP'), with Ofcom retaining a right of approval.
- 3.7 Rules on the amount and distribution of advertising, on programme sponsorship and on the proscription of political advertising remain with Ofcom. The powers of statutory sanction (including fines and the removal of licences) created by the Act are also reserved to Ofcom.
- 3.8 The co-regulatory regime contains all the same regulatory instruments and penalties as did the system when operated solely by Ofcom.
- 3.9 A clear and logical division therefore exists for the roles of Ofcom and ASA in ensuring protection for viewers across programming (editorial) and advertising: editorial and sponsorship content is overseen by Ofcom, advertising by the ASA.

European legislation

- 3.10 It is a fundamental principle of European broadcasting regulation that advertising and editorial, that is programming, must be kept separate. This ensures that viewers understand when they are being sold to, that appropriate regulatory safeguards are in place, that editorial integrity is protected and that a broadcaster's maximum daily advertising minutage is properly calculated.
- 3.11 Article 10 (1) of the TWF Directive provides:
- "Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means."
- 3.12 Article 18 limits the amount of transmission time that may be used for advertising and teleshopping.

¹⁷ section 335 of the Act

¹⁸ The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004

¹⁹ To accommodate their new role in regulating broadcast advertising, the pre-existing, self-regulatory ASA, its industry arm the Committee of Advertising Practice (CAP), and the ASA's separate treasurer, the Advertising Standards Board of Finance (ASBOF) were complemented by broadcast equivalents: ASA(B), BCAP and BASBOF. However, the system is designed to work as a unitary function as far as possible. The councils of ASA and ASA(B) have 10 of 13 members in common, and the memberships of CAP and BCAP, and of ASBOF and BASBOF, also overlap. ASA, ASA(B), CAP and BCAP share a secretariat. For simplicity, we refer in this document just to ASA, BCAP and BASBOF.

- 3.13 'Television advertising' is defined in Article 1(c) as "any form of announcement broadcast whether in return for payment or for similar consideration or for broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment."
- 3.14 'Teleshopping' is defined in Article 1(f) as "direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment."
- 3.15 The TWF Directive also refers to 'programmes' but does not define the term.
- 3.16 The TWF Directive is soon to be amended by the new Audiovisual Media Services ('AVMS') Directive. The AVMS Directive has been under discussion by the European Council and the European Parliament since December 2005, when the European Commission first published its proposals. On 24 May 2007, the Council reached agreement on a 'Common Position' and the AVMS Directive is likely to be formally adopted by the end of the year, with two years for national implementation in Member States. The AVMS Directive extends the scope of the rules to cover video-on-demand services, and liberalises the advertising rules for broadcasting services. However, the separation principle remains unchanged, as is the definition of television advertising, which is now presented as one of the four categories under the new concept of 'audiovisual commercial communications' (the others being sponsorship, teleshopping and product placement).
- 3.17 In addition to reflecting the requirements of the Act and the TWF Directive, the Broadcasting Code has been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights ('the Convention') - in particular, the right to freedom of expression, as expressed in Article 10 of the Convention, encompasses the audience's right to receive – and the broadcaster's right to broadcast - creative material, information and ideas without interference but subject to restrictions proscribed by law and necessary in a democratic society.
- 3.18 Ofcom's Broadcasting Code, in light of its statutory duties, also requires that the separation principle applies to radio.

Types of service that may be provided under a broadcasting licence

- 3.19 A service will be licensable if it falls within one of the statutory licence definitions in the Act. Ofcom can only license a service if the provider of that service ('the broadcaster') falls under UK jurisdiction in accordance with the TWF Directive.
- 3.20 Television services require different licences depending on delivery platform. Put simply, Television Licensable Content Services ('TLCS') licences are for services made available using either satellite, an electronic communications network (such as cable), or a radio multiplex. Services made available on a television multiplex (digital terrestrial television) are licensed as Digital Television Programme Services ('DTPS') or Digital Television Additional Services ('DTAS'). Channels 3, 4, 5 and Public Teletext hold individual licences.
- 3.21 Ofcom recognises three types of service which can be provided under a TLCS, DTPS or DTAS licence: editorial, teleshopping or self-promotional (these latter two are specific types of advertising). In each case, the licence obliges the licensee, among other matters, to comply with the Rules on the Amount and Distribution of Advertising ('RADA' - discussed further below), the Broadcasting Code and the

BCAP Advertising Code. Ofcom's broadcast licensing guidance notes describe these three types of service as set out below:

- 3.22 An editorial service is a 'normal' programme service, with conventional programme material and scheduled advertising breaks. The majority of television channels fall within this category.
- 3.23 A teleshopping service is a service which consists entirely of teleshopping. Teleshopping is a particular form of advertising involving the broadcast of direct offers to the public with a view to the supply of goods or services in return for payment. For the avoidance of doubt, teleshopping services may not broadcast material (other than permitted advertising) which does not contain direct offers to the public. A teleshopping service may therefore not contain any conventional programme elements such as news, sport, films, documentaries or drama, etc.
- 3.24 A self-promotional service is a service which consists entirely of self-promotional material. Self-promotional material is a particular kind of advertising in which the broadcaster promotes its own products, services or channels. Spot advertising and teleshopping for other products and services are permitted on self-promotional services up to the same limits as for editorial services. For the avoidance of doubt, self-promotional services may not broadcast material (other than permitted advertising and teleshopping) which does not promote the broadcaster's own goods or services. A self-promotional service may not therefore contain any conventional programme elements such as news, sport, films, documentaries or drama, etc.
- 3.25 If broadcasters wish to change the nature of their service, e.g. from teleshopping to editorial, or the name of the service the change must be agreed with Ofcom in advance. It will then be regulated by the appropriate body under the relevant code.

Variation of broadcasting licences

- 3.26 Section 4(1) of the Broadcasting Act 1990 gives Ofcom a wide discretion to set licence conditions including:

“(a) such conditions as appear to OFCOM to be appropriate having regard to any duties which are or may be imposed on them, or on the licence holder, by or under this Act, the Broadcasting Act 1996 or the Communications Act 2003;

(d) conditions providing for such incidental and supplemental matters as appear to OFCOM to be appropriate.”

- 3.27 This should be read in conjunction with the principal duty of Ofcom which is:

“(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition”²⁰.

- 3.28 Ofcom has the power to vary a licence by notice if the licensee has been given a reasonable opportunity of making representations about the variation²¹.

²⁰ Section 3(1) of the 2003 Act

Overview of Ofcom's responsibilities

- 3.29 As mentioned above, Ofcom has a statutory obligation to draw up a code for television and radio, covering standards in programmes, sponsorship, and fairness and privacy. The standards set by Ofcom must be those which Ofcom considers best calculated to secure certain standards objectives set out in the Act²². Ofcom therefore published a new Broadcasting Code in May 2005; this came into force in July 2005.
- 3.30 Section 319 (4) of the Act provides that, in setting standards for broadcast content, Ofcom must have regard to, amongst other things, the desirability of maintaining the independence of editorial control over programme content. Section 10 of the Broadcasting Code (Commercial references in programmes) reflects both this and the separation requirements of the TWF Directive.
- 3.31 Accordingly, Section 10 of the Broadcasting Code includes rules to ensure that products and services are not promoted within programmes, except in limited and defined circumstances, and to prevent unduly prominent references to products and services in programmes. In essence, this is to maintain independence of editorial control and prevent programmes becoming advertisements for products and services. Under Rule 10.9 of the Broadcasting Code, a premium rate telephone service ('PRS') will normally be regarded as a product or service and consequently may only be used in programmes in certain limited circumstances, that is, where:
- the PRS is a 'programme-related service' as defined in the Broadcasting Code, i.e. it is "both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme", e.g. SMS updates from *Channel 4 News*; or
 - the PRS "forms part of the editorial content of the programme", e.g. viewer voting in *I'm a Celebrity Get Me Out Of Here*.

BCAP Television Advertising Standards Code and BCAP Rules on the Scheduling of Television Advertisements

- 3.32 The BCAP Advertising Code and the BCAP Rules on the Scheduling of Television Advertisements set out the rules that govern advertisements on television channels licensed by Ofcom. The rules are based on enduring principles; that advertising should not mislead, cause deep or widespread offence or lead to harm, particularly to the vulnerable. Of particular relevance to this consultation are the rules which place explicit scheduling restrictions on the advertising of adult chat services (Rule 11.1.2 of the BCAP Advertising Code) and particular content limitations on the advertising of psychic reading services (Rule 10.3) and dating services (Rule 11.7).

Amount and distribution of advertising

- 3.33 Section 322 of the Act gives Ofcom the power to give directions to its licensees on the amount, scheduling and presentation of advertising. The relevant rules are contained in RADA. Rules regarding the content of television advertising are administered by the ASA under the BCAP Advertising Code.

²¹ Section 3(4)(b) of the 1990 Act

²² See Section 319(2)

- 3.34 RADA recognises a number of sub-categories of advertising. In particular, they provide for all advertising channels consisting of either teleshopping or self-promotional content. General editorial channels may also carry teleshopping, both in the form of short 'spot' advertisements and longer 'windows', of a minimum 15 minutes duration. The maximum time per day allowed for such windows is three hours. Self-promotional channels carry a particular kind of advertising in which the broadcaster promotes its own products, services or channels. Both teleshopping and self-promotional channels are prohibited from carrying editorial/programming material.
- 3.35 The public service broadcasters ('PSBs') that carry advertising (that is, Channel 3 licensees, Channel 4 and Five) are not permitted the three hour teleshopping windows i.e. there is no additional airtime for teleshopping on these channels. They may run long-form advertisements, including teleshopping, between midnight and 6am. However, during this period they are still limited to a maximum of 12 minutes of advertising in any one clock hour. The minutage also counts towards their hourly average daily spot advertising allowance (seven minutes across the day, eight minutes in peak).

Sanctions

- 3.36 In respect of advertising, the ASA has the power to require broadcasters to remove or suspend advertisements. In addition, as noted above, Ofcom has a range of sanctions it may impose on broadcasters found in serious breach of the codes, whether in respect of editorial or advertisements. These include a direction to broadcast a statement of Ofcom's findings, a financial penalty and, in the most serious of cases, the revocation of a licence (not in the case of the BBC, Channel 4 and S4C).

Other regulatory authorities

- 3.37 ICSTIS²³ regulates premium rate services as defined in the Act. Its role is to prevent consumer harm and it regulates premium rate services in their entirety - their content, promotion and overall operation - through a Code of Practice. Among other things, ICSTIS requires:
- clear and accurate pricing information;
 - honest advertising and service content; and
 - appropriate and targeted promotions.
- 3.38 ICSTIS investigates complaints, and has the power to fine companies and bar access to services if the Code of Practice is breached. Other possible sanctions include ordering the service provider to pay reasonable and valid claims for compensation, and barring the individual(s) behind a company from running any other premium rate services under any company name on any telephone network for a defined period.

²³ Independent Committee for the Supervision of Standards of the Telephone Information Services, to be renamed 'PhonePayPlus'

- 3.39 In addition, the Gambling Commission²⁴ has queried whether some quiz TV services as currently operated will fall to be treated as lotteries under the new provisions in the Gambling Act 2005, which will be fully implemented in September 2007.

²⁴ the regulatory body for all commercial gambling in Great Britain with the exception of spread betting and the National Lottery

Section 4

Protection of viewers and consumers

Overview

- 4.1 PTV has become increasingly prevalent in various forms, ranging from mainstream programming (e.g. reality shows, game shows and magazine-format programmes) to more niche or genre-specific content, such as quiz TV, psychic TV and adult chat TV. In early 2006, Ofcom and ICSTIS produced new regulations to address a number of concerns about viewer and consumer protection that were raised by quiz TV. Ofcom also reviewed the position in its December 2006 Issues Paper, which raised the question whether there should be increased protection for PTV viewers and participants.
- 4.2 Shortly after this was published, a number of separate incidents came to light in early 2007 which suggested there were serious failures within the broadcasting industry, in both quiz TV and more mainstream programming, and called into question the integrity of PRS-based participation. These incidents have been or are currently being investigated by either Ofcom or by ICSTIS. Ofcom recently published adjudications by the Ofcom Content Sanctions Committee regarding *BrainTeaser* on Five²⁵ and *Blue Peter* on BBC1 (and CBBC)²⁶ where the broadcasters were fined for serious breaches of the Broadcasting Code. ICSTIS has also published adjudications.
- 4.3 In parallel to these specific investigations, on 22 March 2007 Ofcom announced the launch of an inquiry to consider whether there were any systemic reasons behind these compliance failures.
- 4.4 The issues raised are explored further below.

Ofcom's duties to citizens and consumers

- 4.5 Ofcom has a duty under the Communications Act 2003 ('the Act') to further the interests of citizens and consumers²⁷. Ofcom's duties under the Act are discussed further in Section 3 of this consultation paper.
- 4.6 As noted in Section 3, one of Ofcom's duties is to set standards for broadcast services which it considers best calculated to secure certain standards objectives set out in section 319(2) of the Act. Ofcom's Broadcasting Code (which applies only to editorial content, i.e. programmes, and not to advertising) sets out the editorial standards which apply in programmes, for example, to secure the protection of under 18s, provide adequate protection to members of the public so as to prevent the inclusion of harmful or offensive material, and accuracy in news. In addition, as noted earlier, the Broadcasting Code contains rules to ensure that advertising is kept separate from editorial content.
- 4.7 Advertising on television is regulated separately under the BCAP Advertising Code. The rules in the BCAP Advertising Code are framed to ensure that advertisements

²⁵ Full adjudication available at http://www.ofcom.org.uk/tv/obb/ocsc_adjud/channel5.pdf

²⁶ Full adjudication available at http://www.ofcom.org.uk/tv/obb/ocsc_adjud/bbc.pdf

²⁷ Section 3(1) of the Act

are legal, decent, honest and truthful and do not mislead or cause harm or serious or widespread offence.

- 4.8 The Broadcasting Code has tended to focus on standards which seek to protect viewers from harmful or offensive content rather than the type of consumer protection standards set out in the BCAP Advertising Code. This is because, in contrast with advertisements, there is only limited scope for promotional messages in programmes and therefore, at least until recently, programmes have not tended to raise the same types of consumer issues, for example regarding misleading price information about products or services. Further, since the Broadcasting Code's focus is on editorial programming, its concerns – as required by the Act – are more on broadcasters' and the audience's right to freedom of expression rather than consumer protection.
- 4.9 Nevertheless, the Broadcasting Code does contain rules for the protection of viewers and listeners insofar as they participate in broadcast content. Those directly relevant to the use of PRS and participation in quizzes are:
- Rule 2.11: Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known
 - Rule 10.10: Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS').

Quiz TV and consumer protection

- 4.10 Over the last two years or so – and until recent events which raised serious questions about programmes using PRS - quiz TV had become increasingly prevalent on television screens. This prevalence was met with growing concerns about the way quiz TV operated, including the potential for exploiting vulnerable viewers, the chances of callers being connected to the studio, the possibility of financial hardship, lack of understanding about the charging of phone calls and the total bill being run up, and the methodologies behind puzzles.
- 4.11 To address these concerns, both Ofcom and ICSTIS, the premium rate services regulator, have set standards for quiz TV services which provide adequate protection for all consumers, including those who are not familiar with the genre.
- 4.12 As stated earlier in this document, ICSTIS regulates the promotion and operation of the premium rate services whilst Ofcom is responsible for the regulation of the editorial broadcast content, that is the on-air conduct of the quizzes. Rule 2.11 of Ofcom's Broadcasting Code states: "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known." It is also a requirement of the Broadcasting Code that broadcasters comply with the ICSTIS Code.
- 4.13 In addition to the standards set out in the Broadcasting Code, in 2006 Ofcom and ICSTIS produced detailed new regulation aimed at ensuring best practice in the industry and providing appropriate consumer protection. This regulation led to significant changes in quiz TV, for example:
- greater on-screen and on-air clarity in pricing;
 - greater clarity of call costs when consumers participate;

- clearer information about the fact that consumers pay for calls whether or not they get through;
 - rules concerning the use of clocks and countdown triggers to ensure viewers are not misled;
 - greater prominence given to free routes to entry; and
 - protections to help ensure that prizes are not presented as solutions to financial hardship.
- 4.14 Ofcom and ICSTIS have kept quiz TV under review to ensure that consumers are protected and standards are maintained. As a result, Ofcom now has very detailed guidance on Rule 2.11²⁸, and in April 2007, ICSTIS published new rules for quiz TV²⁹, the key provisions of which tightened up regulation in the following areas:
- Transparency as to viewers' chances of getting through to air: the chances of acceptance or rejection of an attempt by a viewer to get beyond the first stage must be shown on-screen in near real-time.
 - Pricing information: in addition to ICSTIS' other requirements in this area, pricing information must be spoken by a presenter or voice-over at intervals of no more than 10 minutes.
 - Call cost warnings: these must be provided to all callers (other than where the number is withheld) at intervals of no more than each £10 spent in each calendar day.
- 4.15 Ofcom considers that, taken together, ICSTIS and Ofcom's rules and guidance on quiz TV address the key recommendations made by the Culture, Media and Sport Select Committee in January 2007³⁰.
- 4.16 In addition to this policy work, Ofcom has investigated a number of cases regarding specific quiz TV output, ranging from unfair puzzle solutions to allegations regarding 'faked' winners. Ofcom's published findings on these cases make clear its extremely serious concerns about such conduct and, where appropriate, sanctions have been imposed against broadcasters found in breach of Ofcom's Broadcasting Code.

Inquiry into use of PRS in television

- 4.17 As stated above, in March 2007, Ofcom asked Richard Ayre, a non-executive member of the Ofcom Content Board³¹, to lead an inquiry ('the Inquiry') to establish whether there were any systemic reasons behind the large number of apparent failures of compliance in the use of PRS in television programmes that had suddenly come to light.

²⁸ The guidance is available at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance2.pdf>

²⁹ See 'Call TV Quiz Services Review: A Revised Statement of Expectations' at http://www.icstis.org.uk/pdfs_consult/Calltvquiz_SoE.pdf

³⁰ <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcmums/428/428.pdf>

³¹ a committee of the main Ofcom Board, with delegated and advisory responsibility for a wide range of content issues

4.18 The Inquiry, launched in March 2007, was charged with making recommendations on actions needed to restore confidence and trust in the use of PRS by television broadcasters. Its terms of reference included consideration of:

- Consumer protection issues and the extent to which viewers value PRS in television programmes;
- The benefits and risks to broadcasters in the use of PRS in programmes;
- The respective compliance responsibilities of broadcasters, producers, telecoms network operators and others involved in those programmes; and
- The effectiveness of broadcasters' and telecoms operators' internal compliance procedures, guidelines and arrangements to ensure compliance with Ofcom and ICSTIS codes.

4.19 The Inquiry was concerned with the use of PRS compliance on television. Radio was not included in the scope of the report, although radio interests were alerted to it. One of the Inquiry's recommendations was that, if Ofcom decided to consult on a proposal to amend the licences of television broadcasters to include provisions intended to enhance consumer protection, Ofcom should also seek views on the extension of these provisions to radio licensees.

4.20 The Inquiry's findings and recommendations were published in a report on 18 July 2007 at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/>. The Inquiry commented on the apparent failure by many broadcasters to understand the fundamental nature of their obligations to viewers taking part in programmes:

“Perhaps the most important conclusion of this inquiry is the need to instil among broadcasters and producers a clear understanding that they have an obligation each and every time a viewer pays a premium in the expectation of receiving an additional service. An appreciation of the contractual nature of the relationship between the broadcaster and the viewer-consumer is important not because of its practical value to individual consumers who may want to seek redress, but because it clearly indicates that broadcasters offering PRS have a set of obligations to individual customers which go beyond their traditional responsibilities towards audiences as a whole. This inquiry is satisfied that that new relationship has not been adequately recognised or addressed by many broadcasters and that further regulatory intervention must be centred upon securing the broadcaster's delivery of its obligations.”

4.21 The Inquiry concluded that it is broadcasters and their producers who have the most influence over the chain of operation and who wield by far the greatest economic power within the value chain. The Inquiry's view was that the single most effective regulatory measure would be to make broadcasters directly responsible for PRS compliance right through the supply chain, just as they would be for broadcast content. The Inquiry therefore recommended that television broadcasting licences be amended to include a set of requirements associated with consumer protection in relation to premium rate and any other direct commercial transactions. It also recommended that broadcasters should be required to undertake an independent audit of their PRS processes and systems and that Ofcom should consider extending the proposed licence variation to apply to radio licensees.

- 4.22 The Inquiry also recommended that a series of other, more particular measures should be introduced as guidance on best practice³². These measures would guide broadcasters to practices that would provide the viewer-consumer with important information and reinforce the need for broadcasters to protect the consumer interest, particularly where the needs of programme-making produce competing pressures. These measures will be subject to a separate policy examination over summer 2007.

Proposals for increased viewer and consumer protection

General: licensing changes

- 4.23 Ofcom agrees with the Inquiry's conclusion that broadcasters should be directly responsible for PRS compliance right through the supply chain, and has decided that this recommendation should be taken forward as a proposal for consultation. Ofcom believes that varying broadcasters' licences will provide clear regulation at the most effective point in the chain and maximise consumer protection. This consultation paper therefore includes proposals for a licence variation, closely based on the draft licence variation suggested in the Inquiry report. The new draft licence conditions would set out broadcasters' compliance responsibilities; these would include, for example, a requirement for broadcasters to ensure that voting and competitions are conducted in such a way as to provide fair and consistent treatment of all eligible votes and entries.
- 4.24 The Inquiry report suggests that PRS use, by the larger broadcasters at least, may have peaked. But it will continue, and other forms of pay interaction may emerge. The Inquiry report proposed that, so far as possible, the licence variation should be able to anticipate changes and be written in terms that are adaptable to future scenarios. Ofcom therefore agrees that any licence variation should be worded in a technologically neutral way as far as possible.
- 4.25 This proposed re-focusing of the regulation of broadcast use of PRS on to broadcasters would clearly have implications for the arrangements between ICSTIS and Ofcom. Ofcom and ICSTIS are considering the possible ramifications and will continue to do so as this consultation progresses.
- 4.26 As noted above, although the Inquiry was confined to television broadcasters, it recommended that equivalent measures for radio licensees should also be considered in the course of subsequent consultation. Ofcom and ICSTIS are currently investigating a number of cases involving radio stations' use of PRS and Ofcom considers that the kinds of problems identified in the course of the Inquiry are unlikely to be confined to television. This consultation therefore seeks views from respondents on whether radio licensees should be subject to a similar licence variation.

Verification of PRS compliance processes

- 4.27 The Inquiry proposed that the licence variation should include a requirement for a system of audit. The Inquiry considered audit necessary only for PRS. In view of the recent serious failings by broadcasters and breaches of viewer trust, Ofcom is proposing that a broadcaster's compliance processes in respect of PRS should include some degree of independent third party oversight or verification. This is considered particularly appropriate, given that it would help to address a particular problem of PRS (and potentially other forms of interactivity) in that problems with

³² See paragraphs 1.48 to 1.55 of the Inquiry's report.

ineffective systems, or weaknesses within systems, are not otherwise easily detected in practice. A number of the recent incidents only came to light because of information provided by 'whistleblowers', since failures in the operation of PRS are extremely difficult, if not impossible, to detect through viewer complaints or output monitoring.

- 4.28 However, Ofcom recognises that there may be alternatives to a formal annual audit that would be sufficient to ensure that broadcasters discharge – and are able to demonstrate that they have discharged – the responsibilities set out in the proposed licence variation. This approach is also consistent with the need for Ofcom's regulations and interventions to be proportionate.
- 4.29 Therefore, in relation to the issue of third party verification, this consultation paper seeks views on the following options, each of which involves a (varying) degree of scrutiny by an independent third party and varying reporting requirements. Ofcom is not expressing a preference for any particular option and invites representations as to which of the options is considered to be the most appropriate. We would also welcome other suggestions from stakeholders:

Option A: Regular verification, reporting on request

- 4.30 Under this option, a broadcaster would be required under its licence to obtain regular (for example, annual) assessment by an independent third party that its systems and processes were sufficient to satisfy its obligations under the new licence conditions. It would be for the broadcaster to decide what form in practice this verification should take and Ofcom would not approve in advance any particular scheme put forward by a licensee. However a broadcaster's verification arrangements should be fit for purpose to fulfil the obligations under the new licence conditions.
- 4.31 Option A would also require the broadcaster to provide Ofcom *upon request* with an independent report confirming that the broadcaster's processes have been tested and found to ensure compliance with the licence obligations.

Option B: Regular verification, regular reporting

- 4.32 Under this option, regular (for example, annual) independent third party verification, including appropriate testing, would be required to demonstrate a broadcaster's compliance with the fundamental requirements set out in the licence variation. As with Option A, it would be for the broadcaster to decide what form in practice this verification (and testing) should take.
- 4.33 Ofcom would not approve in advance any particular scheme put forward by a licensee. A broadcaster's verification arrangements should be fit for purpose to fulfil the obligations under the new licence conditions. However, Ofcom would require a regular report to be submitted regarding the outcome of the independent verification. This report would be required to highlight any problems identified by the independent third party; it would not be sufficient to submit un-interpreted data to Ofcom.

Option C: Detailed audit specification

- 4.34 Under this option, the licence variation would include a requirement for a formal and independent annual audit by a third party and, in contrast with Options A and B, a detailed audit specification would be set out in notes of guidance or otherwise published on the Ofcom website. The specification would prescribe the processes to be put in place by the broadcaster to ensure and help demonstrate its compliance

with the provisions set out in the licence variation. All relevant activities in the relevant period would require auditing.

- 4.35 Amongst other matters, the broadcaster would be required to provide a detailed annual submission to Ofcom from an independent, appropriately qualified third party, highlighting any problems identified. This consultation paper does not include a draft audit specification; drawing up such a specification would require expert input and due consideration. However, other models of audit required by Ofcom – albeit in respect of telecommunications rather than broadcasting – may be instructive, for example:
- the Ofcom Metering and Billing Direction (issued under the Communications Act 2003), a standard setting out detailed requirements with which communications providers must comply in order to gain approval for their metering and billing systems;
 - the requirement, as part of BT's formal Undertakings under the Enterprise Act 2002, for BT's implementation of its user access controls to be subject to a mix of internal and external audit³³.
- 4.36 Independent audit of this prescriptive nature would help ensure that compliance measures were robust and that failings by parties in the value chain, for example the producer or service provider, were detected. However, it would impose a – possibly significant - regulatory and financial burden upon broadcasters.
- 4.37 The Impact Assessment in Annex 7 considers the possible impact of the above options.
- 4.38 Ofcom would welcome stakeholders' views on each of the options. Questions are set out below (and repeated in Annex 4; see Annexes 1, 2 and 3 on how to respond):

Do you agree that television broadcasters should be directly responsible for PRS in programmes and also for other forms of communication where viewers seek to interact with programmes? Please explain why.

If so, do you agree that a variation to television licences would be the most appropriate way of ensuring that broadcasters are responsible for such PRS compliance?

Do you agree that there is a need for broadcasters to obtain independent, third-party verification that they are in fact complying with the draft licence obligations set out in Paragraph 2 of the draft licence variation? If so, which of the options for verification discussed in Section 4 do you think is most appropriate? Are there other appropriate options? Again, please provide reasons.

Do you have any comments on the draft licence variation set out in Annex 5? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

Do you agree that the draft licence obligations should not be limited to television but should also apply to radio broadcasters? Please provide reasons.

³³ Ofcom statement on BT OSS Separation, published 21 June 2007, available at http://www.ofcom.org.uk/consult/condocs/bt_oss/statement/statement.pdf

Section 5

Dedicated PTV – a description

Overview of the issues

- 5.1 This consultation paper uses the term ‘dedicated PTV’ to describe television programmes and channels predicated – in terms of both the content itself and the funding of that content - on the use of premium rate services.
- 5.2 With the exception of interactive dating channels and shopping channels, dedicated PTV is currently categorised as editorial content – as opposed to a form of advertising – and is therefore regulated under Ofcom’s Broadcasting Code. The key genres of dedicated PTV examined in this consultation paper are quiz TV, adult chat TV and psychic TV, as these raise particular questions about separation of editorial content from advertising (see Section 6 for a detailed discussion). However, there may be other examples of dedicated PTV that raise similar regulatory questions.
- 5.3 A key characteristic of these dedicated PTV genres is that they contain prominent, frequent, and sometimes constant, messages to viewers to call (or text) one or more premium rate numbers; the telephone number is usually permanently displayed on screen.
- 5.4 Also, Ofcom has observed a number of instances where dedicated PTV promotes premium rate numbers other than those that clearly allow viewers to participate directly in the editorial content.
- 5.5 There are also a number of TV services currently permitted as editorial services, which offer adult chat or psychic readings. These services need to retain editorial status in order to broadcast since the BCAP Advertising Code prohibits advertisements for live adult chat services on unencrypted channels and for products or services concerned with the occult or psychic practices.
- 5.6 However, since they often contain repeated invitations to viewers to call a premium rate chat line, there is therefore at least an argument that, by broadcasting under the auspices of an editorial service, they are circumventing the advertising prohibitions.
- 5.7 Premium rate phone lines for psychic readings and chat services are of course neither new nor limited to television. There are numerous such services without a television presence, often promoted via the internet or in magazines. However, when they are featured within what are ostensibly television programmes, they raise regulatory questions for Ofcom and broadcasters.
- 5.8 Section 6 explores the regulatory options for dedicated PTV, and there is further analysis of the market in the Impact Assessment in Annex 7.

The dedicated PTV market

- 5.9 The Mediatique report³⁴ contains information on the nature and size of the market for dedicated PTV services. Because of the lack of published financial data for PTV, the report makes a number of assumptions. However, its broad conclusions closely

³⁴ <http://www.ofcom.org.uk/consult/condocs/participationtv/marketoverview.pdf>

match those reached by Ofcom based on information which we ourselves have received from licensees. Key points to emerge are:

- The dedicated PTV market as a whole has grown rapidly in recent years – Mediatique estimates by an annual compound rate of 16% since 2005.
- Mediatique estimated that approximately £118m of gross revenue was likely to be generated in 2007. Of this approximately £85m net would accrue to broadcasters and programme producers, the remainder to premium rate operators and others.
- However, apart from the PTV services provided by ITV and Channel 5 on their terrestrial channels, competition between providers means that the services are likely to be operating at marginal profitability.
- Nonetheless, PTV is likely to continue to evolve taking advantage of new technologies and developments in content.

- 5.10 Several factors have driven the rapid growth of PTV: firstly, the falling cost of launching and operating interactive digital satellite channels; secondly, the demand from consumers for participation TV formats; and thirdly, the increasing competition for advertising and subscription revenue which has led broadcasters to seek alternative revenue streams.
- 5.11 By far the largest sector is quiz TV which Mediatique estimated would generate around 74% of the total gross revenue referred to above (i.e. £86.9m). At the time of Mediatique's report, there were three standalone quiz TV channels, and blocks of quiz TV were broadcast on around 20 other channels including ITV1 and Five, typically during non-peak periods. However, the position has changed in recent weeks: at the time of writing there are no longer any standalone quiz TV channels.
- 5.12 TV chat (adult and psychic) is the next largest sector with 17% of total gross revenue (i.e. £20.3m) expected in 2007. The Mediatique report noted that there were five dedicated channels broadcasting for all or most of the day and blocks of chat TV broadcasting on around ten other channels.
- 5.13 The smallest sector is dating, accounting for around 9% of total gross revenue (i.e. £11.1m) in 2007 and with four dedicated channels at the time of Mediatique's report.
- 5.14 Costs vary considerably depending on the nature of the channel. Mediatique estimates the range to be between £0.5m and £1.6m. Dating services, because they rely predominantly on the automated processing of calls and have no on-screen presenters and lower bandwidth requirements, would be towards the bottom end of the range. Quiz TV, depending on production values, would probably be towards the top end.
- 5.15 Profit margins also appear to vary considerably. The quiz TV blocks broadcast on ITV1 and Five, with their access to terrestrial audiences, are understood to generate significant profits. However, some of the PTV services on digital channels appear to be operating either at marginal profitability or even a loss. This is reported to have been a major factor in the closure of the digital ITV Play channel in March 2007, for example.
- 5.16 Pressure on advertising and subscription revenue is likely to continue to be a powerful driver on broadcasters to develop alternative revenue streams. Indeed developments in technology such as convergence between TV and the internet, and

in content such as interaction between participants, may well open up fresh opportunities for growth in the future.

Quiz TV

- 5.17 Quiz TV, and its regulation, have been discussed in Section 4 of this document in the context of consumer and viewer protection issues. Its key features are examined here.
- 5.18 There are essentially two types of quiz TV – presenter-led quizzes and graphics-based quizzes. Presenter-led quiz TV seems to be the more prevalent and popular, and has also generated the most concerns - from viewers and the Culture, Media and Sport Select Committee amongst others - in terms of costs, fairness of methodology and chances of getting through. In addition to investigating complaints about methodology (for example, obscure puzzle answers), Ofcom has recently published adjudications regarding serious breaches of the Broadcasting Code, including ‘faked’ winners.
- 5.19 Presenter-led quiz TV is live. A puzzle is displayed and viewers are encouraged to call a premium rate number, which is displayed almost permanently on-screen. The vast majority of callers do not get an opportunity to give their answer; instead they hear a recorded message telling them they have not been successful on this occasion. A very small proportion of callers are randomly selected during the course of the show and put through to the studio to give their answer. Successful contestants win prizes. Most presenter-led quiz TV also allows free entry via a website, although this appears to be less prominently promoted on-air than the PRS route. According to CRG’s content analysis for Ofcom³⁵, about a third of this type of quiz TV also allows entry via text.
- 5.20 Graphics-based quizzes are pre-recorded and do not involve an onscreen presenter. The only means of entry is via text. Ofcom receives relatively few complaints about graphics-based quiz TV. This may be because, compared with presenter-led quizzes, these are niche services with smaller audiences and winners do not win instant cash prizes.

Adult chat TV

- 5.21 Adult chat TV is usually (if not always) unencrypted, i.e. available on free-to-air channels, and available pre-watershed as well as post-watershed. It involves one or more female presenters, usually described on air as ‘babes’, who ask viewers to call them - or another ‘babe’ who is not visible on screen. Viewers cannot hear what either the presenter or the caller is saying; while the presenter takes the call, either background music is played or another presenter talks to viewers. One or more PRS numbers are displayed on screen almost permanently; viewers may call in or text the presenters.
- 5.22 Some adult chat TV promotes premium rate services other than those that clearly enable participation in the show and it is often unclear how this type of promotional activity is consistent with the Broadcasting Code e.g. “We have girls at home waiting to take your call”.
- 5.23 Adult chat services are currently categorised as editorial and must therefore comply with the standards set out in the Broadcasting Code; the rules regarding protection of

³⁵ Available at <http://www.ofcom.org.uk/consult/condocs/participationtv/contentanalysis/>

under-18s and ensuring adequate protection against harm and offence are particularly relevant to this genre. Whilst these specific issues of harm and offence in the context of adult chat TV are outside the scope of this consultation, Ofcom takes them extremely seriously and would take this opportunity to remind stakeholders of the need to exercise great caution, with regard to both on-screen activity and language and the nature of the calls themselves.

- 5.24 Ofcom is currently undertaking a number of investigations in this area regarding compliance with the Broadcasting Code, and has recently published significant findings in Ofcom's Broadcast Bulletin, which provide additional guidance to licensees who operate adult chat TV services³⁶.

Psychic TV

- 5.25 Participation TV services featuring psychic readings, e.g. tarot readings, or psychic advice are currently not as widespread as either TV quiz services or adult chat services. Typically, a presenter repeatedly asks viewers to call a premium rate number (displayed on screen all or most of the time) for a reading or advice from an in-studio 'psychic' or from 'psychics' visible on-screen but based outside the studio, either in a call centre or in their own homes, or indeed from off-screen 'psychics'. Viewers are also asked to text in; their text messages appear on screen from time to time. The in-studio 'psychic' responds to calls or text messages on-air, by giving advice or a reading. The other 'psychics' are sometimes shown on-air in split-screen but their conversations with callers are not audible to viewers.
- 5.26 In addition to questions of undue prominence and the promotion of products and services in programmes, this genre has the potential to raise concerns regarding vulnerable viewers. The Broadcasting Code seeks to address these concerns; amongst the relevant rules is Rule 2.8 which provides:

"Demonstrations of exorcism, the occult, the paranormal, divination or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals."

Audience research commissioned by Ofcom

- 5.27 In January - February 2007, Essential conducted quantitative research for Ofcom via an online survey amongst people aged 16-64 years in Great Britain and qualitative focus groups and depth interviews among regular viewers of quiz TV, psychic TV and adult chat TV³⁷.
- 5.28 The key aspects of Essential's research for Ofcom are summarised below:
- One in three TV viewers in Great Britain has used a PRS number to participate in some way in a TV programme in the 12 months before Essential conducted its research ('the last 12 months').
 - Regular viewers of psychic and quiz TV channels tend to be younger and tend to be from socio-economic groups D and E, compared to TV viewers in general, although viewing spans all demographic groups.

³⁶ Gamecast UK Ltd and its service You TV 2, http://www.ofcom.org.uk/tv/obb/prog_cb/obb82/ and Naughty Nurse on Turn on TV http://www.ofcom.org.uk/tv/obb/prog_cb/obb85/

³⁷ Available in full at <http://www.ofcom.org.uk/consult/condocs/participationtv/research>

- 8% of people polled claimed to watch quiz TV services regularly; 3% claimed to watch psychic and 1% claimed watch adult chat. In the last 12 months, most regular quiz viewers have called in; there is an indication that less than half of regular viewers of psychic have called in.
- Of the dedicated PTV genres, respondents to the qualitative research considered quiz services to be the most like advertising, but these were also considered to have some editorial merits.
- Respondents to the qualitative research perceived dedicated PTV to contain editorial content, were aware that there were commercial aspects but took part all the same.
- With regard to quiz TV and psychic TV, a minority of respondents mentioned concerns about addiction to calling in and some respondents said that they had experienced very high phone bills.
- For quizzes, some respondents considered that trying to get through was in fact a key motive for taking part. However, respondents thought information about 'odds' and waiting times would be useful to viewers.
- Adult chat services raised few specific concerns.
- Respondents felt that dedicated PTV programmes must be robustly regulated because they are on TV and TV is regulated; however, there was low awareness of the specific regulator and who to turn to in event of concerns. When discussing the possibility of regulation for dedicated PTV, many respondents felt that, as adults, they were responsible for their own actions and that tighter regulation was not necessary.

5.29 The qualitative research provides a useful perspective on dedicated PTV and regular viewers' attitudes and concerns. Whilst to a certain extent the findings are anecdotal (because of relatively small sample sizes involved in the qualitative study), it appears that regular viewers – at least of psychic TV and adult chat TV – enjoy watching the content in its own right, i.e. even where they choose not to participate. The research is one of the factors that Ofcom will consider in deciding how dedicated PTV should be regulated.

5.30 Ofcom will consider separately whether the research has identified issues outside the scope of this consultation that may need further exploration.

Radio

5.31 Section 10 of the Broadcasting Code, which sets out rules to ensure that advertising and editorial content are kept separate, applies to radio and television equally. At this time, chat-based broadcasting content predicated on premium rate telephony appears to be confined to television; we are not currently aware of similar services on radio. However, there does appear to be some PRS-based quiz content on radio. Whilst this document is focussed upon the separation issues presented by dedicated PTV, should any of these issues in fact be of wider application across other broadcasting content, it may be appropriate to consider amendments to the Broadcasting Code that would not be limited to television only³⁸.

³⁸ See in particular Option 2 in Section 6 of this consultation paper.

Betting and gaming services

5.32 For the purposes of this consultation, we do not intend to examine television services involving betting and gaming. At the moment, and subject to the requirements of current gambling legislation, we classify these television services as editorial provided that they take care to avoid undue prominence and on-air promotion of gambling-type services. They must therefore take a cautious approach to encouraging viewer participation, for example by avoiding on-air references to stakes and placing bets and instead keeping such references behind the interactive 'red button'. In addition, these television services do not tend to be predicated on the use of premium rate telephony. This is in marked contrast with other types of PTV. The Gambling Act 2005 will be fully implemented in September 2007. It replaces legislation which imposed significant restrictions on the advertising of gambling services. BCAP's advertising rules will include new rules on the advertising of gambling on television.

Section 6

Regulatory options for dedicated PTV

Introduction

- 6.1 The options discussed in this section are focussed upon the requirement of separation of editorial and advertising. However, broadcasters of dedicated PTV would also need to comply with the draft licence variation discussed in Section 4 and set out in Annex 5.
- 6.2 Where PTV raises revenue – as essentially all programming in the genre currently does, and certainly in dedicated PTV formats – it can present difficulties for the principle that programmes (editorial) and advertising should be kept separate ('the separation principle'). Programming wholly or mainly based on PRS interaction may on the one hand appear inconsistent with traditional broadcasting concepts like that of a disinterested editorial voice. But dedicated PTV can also be seen more broadly as no more than a new business model: programmes and channels funded not by advertising or sponsorship sold around programmes but by viewers' willingness to take part in them. Both points of view are theoretically valid.
- 6.3 In terms of the separation principle and regulation more generally, to understand what is being watched, who placed it and why it has been included in a schedule is fundamental in the regulation of television. Transparency is key to achieving a clear separation for the viewer between what is editorial and what is advertising, so that viewers are not confused about the status and purpose of a message, and so that programmes (i.e. editorial content) do not lose editorial integrity and viewer trust. Further, if material is fundamentally advertising then it is important that it attracts the appropriate and adequate consumer protection.
- 6.4 European and UK broadcasting rules both require that editorial and advertising should be kept separate and the boundaries made distinct, and this is reflected in the fact that there are twin sets of rules, one for advertising, the other for editorial.
- 6.5 Advertising rules – now the responsibility of ASA and BCAP – themselves include a general requirement that there must be a clear distinction between programmes and advertisements. Among other things, this is reflected in a European-level obligation that advertising breaks are marked by "optical and/or acoustic means"³⁹ – in practice, this is often by the use of channel identification symbols ('idents'). The general requirement is also expanded to prohibit advertisements from including current programme extracts or otherwise resembling current programmes.
- 6.6 But even with effective demarcation rules for advertising and editorial it is possible for editorial content to include commercial or other promotional material. The rules in the Broadcasting Code allow for this, subject to certain specified parameters, as they are intended to ensure that independent editorial control is maintained at all times over programme content, that programmes are not distorted for commercial purposes and that the advertising and programme elements are clearly separated. These rules seek to ensure that where names, products, brands etc appear in programmes they do so in a way that is justified by the editorial requirements of the programme.

³⁹ Article 10(1) of the Television Without Frontiers Directive (89/552/EEC) as amended by (97/36/EC)

- 6.7 The Broadcasting Code therefore prohibits the promotion (in the sense of a selling message) of products and services in programmes, except in very limited circumstances. It also prohibits 'undue prominence'.
- 6.8 Some commercial or other interests will inevitably feature quite legitimately in editorial material. News and documentaries, for example, might need to talk repeatedly about a company or product because it forms the proper basis of the report being given. Ofcom also recognises that branding is a part of everyday life and, in considering whether a reference to a product or service is acceptable under the Broadcasting Code, considers both the context and the degree of prominence given on air. But the general position remains that commercial exposure should be no more prominent than can be editorially justified in the context of the programme.
- 6.9 Some clear structure for dedicated PTV is needed whatever the arguments might be about its place as editorial or advertising. Ofcom's overall aim is that dedicated PTV's status and any accompanying rules satisfy the surrounding legal framework (including the need to maintain advertising-editorial separation), provide robust consumer protection, and offer greater certainty for broadcasters.

Permissible forms of advertising

- 6.10 One important constraint on the range of options that can be considered for dedicated PTV is the effect of European rules on the amount of advertising permissible on any television service. In summary, no service may carry more than 12 minutes per clock hour of advertising, other than in the special cases of teleshopping and self-promotional advertising⁴⁰. This was discussed in more detail in Section 3.
- 6.11 Unless long-form advertising falls under one of these two categories, it is not permitted under the advertising minutage restrictions mentioned. This greatly reduces the possibilities for dedicated PTV channels and programme-length formats to be classed as advertising.

Options

- 6.12 Set out below are four options, three that involve classification as editorial (and therefore regulation under the Broadcasting Code), and one in which dedicated PTV channels, blocks of content and programme-length items are categorised as advertising and therefore subject to advertising regulations. The benefits and disadvantages of each option are discussed; these should be read in conjunction with the detailed Impact Assessment set out in Annex 7, which focuses upon the economic consequences for the dedicated PTV industry.

Option 1

No change - existing arrangements continue to apply

- 6.13 Dedicated PTV today is more prevalent and looks rather different than it did a few years ago, with PRS numbers promoted almost constantly and a lack of clarity as to how callers in fact contribute to the content of the programme.
- 6.14 At present, dedicated PTV services (including quiz, psychic and adult chat services) are, in the main, classed and regulated as editorial. However, some PTV-style

⁴⁰ Article 18(2), TWF Directive

channels that use PRS have been categorised as teleshopping where their construction allows little or no appreciable contribution to editorial content, no recognisable editorial is offered or they include straightforward offers of goods or services for sale, e.g. dating and text message-based channels⁴¹. Such services are therefore regulated as advertising under the BCAP Television Advertising Standards Code ('the BCAP Advertising Code').

- 6.15 In applying for a broadcasting licence, dedicated PTV applicants must decide whether they wish to operate an editorial service or an advertising service. Ofcom then considers the application accordingly. In each case an assessment is made of the nature of the service, which components of the service might be treated as editorial and the degree to which participation contributes to that editorial. Broad consideration is given to the nature of the editorial and to the extent of participation in it.
- 6.16 Editorial content is recognised as being different to advertising; in particular it has the benefit of being viewed in context as scheduled material. Therefore certain genres of content that would be prohibited in advertising are permitted as editorial, subject to the provisions of the Broadcasting Code. For example, the BCAP Advertising Code prohibits advertising for all live and most recorded forms of psychic services and prohibits advertising of premium rate services of a sexual nature⁴²; however, the broadcast of sexual content and content involving the occult and paranormal practices are permitted – within certain parameters - under the Broadcasting Code. But the more promotional the content, e.g. the more messages asking viewers to call a PRS line, the harder it may be to justify this difference in approach. It could be argued that frequent calls to action relate to a service being sold or promoted as opposed to genuine editorial material.

Benefits

- 6.17 This option is inevitably the most familiar to licensees already active in the sector and would not require any changes to their current business models or the introduction of new regulation.

Disadvantages

- 6.18 However, the current regulatory framework is still based upon an assumption that promotion of services in programmes is the exception rather than the rule. The Broadcasting Code was not written with this form of television in mind, and it is increasingly difficult to apply the Code in a way that is transparent, consistent and fair to broadcasters, including those who do not provide dedicated PTV services and new applicants. Similarly, licensees who wish to modify services or introduce new services that are variations on established PTV formats require greater regulatory certainty. Distinctions between editorial and advertising appear increasingly arbitrary, and the position will become more complex as PTV applications develop and existing dedicated PTV operators expand their services.

⁴¹ When dating services were first classified as teleshopping, they amounted to little more than text message-boards; the model has since been modified but it remains clearly distinguishable from other types of content such as adult chat. For further discussion, see the Mediatique report at <http://www.ofcom.org.uk/consult/condocs/participationtv/marketoverview.pdf> . This notes at page 31: "...TV dating services operate as intermediary platforms, allowing viewers to post profiles of themselves and to communicate with other viewers. As such, they operate a similar business model to a classified advertising operation..."

⁴² An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only.

- 6.19 In addition, bearing in mind the advertising prohibitions for adult chat and psychic readings are intended, amongst other matters, to protect vulnerable viewers, Ofcom believes greater clarity is needed to achieve an appropriate balance between the degree of commercial activity that may be acceptably promoted within a programme and the link between that activity and the editorial content of the programme.
- 6.20 Ofcom therefore questions whether the present situation is either satisfactory or sustainable.

Option 2

Classed as editorial, subject to new rules

- 6.21 This option is essentially a modification of the existing position, the aim being to allow dedicated PTV to continue to be classed as editorial and regulated under the Broadcasting Code but with clear and strictly applied new rules to limit the degree of, essentially, commercial activity within such content. The new rules would be supplemented by guidance in the Broadcasting Code.
- 6.22 The draft rules below (also set out in Annex 6) are based upon and clarify the existing provisions of Section 10 of the Broadcasting Code, which apply to both television and radio. Ofcom's provisional view is therefore that, if this option is adopted, the new rules should not be limited to dedicated TV but should in fact apply to all PTV, and indeed to radio programming to the extent that it uses PRS, to help ensure an appropriate degree of separation. The new rules have been drafted accordingly; for example they refer to viewers and listeners.

Draft amendments to Section 10 of the Broadcasting Code, Commercial references in programmes

Premium rate numbers

10.9 Premium rate numbers (and their equivalents) will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they ~~form part of~~ enable viewers or listeners to participate in or otherwise directly contribute to or influence the editorial content of the programme (see Rule 10.11);*
- they fall within the meaning of programme-related material (see above).*

10.10 Where a viewer or listener is charged for participation in a programme, the broadcaster must ensure that the viewer or listener is charged at the same time as the participation takes place and by the same process.

10.11 Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).

Guidance on Rule 10.10

Method of participation and payment

At this time, Ofcom considers that, in practice, the only acceptable means of participation and charging of viewers/listeners, for the purposes of Rule 10.10 are

telephony-based applications (including SMS and MMS) and 'red button' technology. Payment by cash, cheque, credit card or money transfer is not permitted.

Participation must directly contribute to or influence editorial content

In considering whether participation directly contributes to or influences the editorial content of a programme, broadcasters should note the following:

- *In chat-based dedicated PTV, e.g. adult chat and psychic, voice calls must be taken by presenters on-air; such calls need not be audible to all viewers. However, callers must not be invited to call or to be diverted to off-screen services, e.g. a call centre.*
- *Dedicated participation programmes must not use a caller's number to generate further contact, whether by voice service, SMS, MMS or other means.*
- *Off-screen services may only be promoted in programmes where they are 'programme-related material' ("PRM") as defined in the Broadcasting Code. Promotion of PRM is strictly regulated under the Code; continual promotion throughout a programme is unlikely to be acceptable.*
- *Particular care must be taken with pre-recorded content which encourages viewers or listeners to participate, as it will often be unclear how viewers or listeners are in fact able to contribute to or influence that content.*

Dedicated participation TV ('dedicated PTV')

This term is used in the guidance to refer to those television channels and programmes that are clearly predicated – in terms of both the content itself and the funding of that content - on participation by viewers in return for payment. Currently, payment tends to be by premium rate telephony although other funding models may emerge. Examples of dedicated PTV include quiz TV, adult chat TV and psychic TV.

Dedicated PTV usually has the following characteristics:

- *prominent and frequent messages to viewers to call (or text) one or more premium rate numbers;*
- *the telephone number is constantly, or almost constantly, displayed on screen.*

6.23 Whilst most PTV involves PRS, as technology develops, similar forms of communication, where the charging mechanism is intrinsic, may develop in future. The draft amendment to Rule 10.9 therefore refers to 'premium rate numbers and their equivalents'.

6.24 Rule 10.9 would also be amended to clarify the requirement of contribution to editorial content. This would ensure that each participant would affect what is seen or heard on screen. For example, a call to a PRS line referred to in a psychic TV service could satisfy Rule 10.9 if the person giving the reading were on screen and could be identified by the caller (though the conversation need not be audible to other viewers). But were such a service also to provide readings over the telephone given by people not featured on screen, it would not satisfy the requirement of contribution to editorial content.

- 6.25 Under the new Rule 10.10, it would be clear that, for example, a broadcaster would not be able to take credit card payment from a viewer or listener seeking to take part in the programme. It is important to remember that members of the audience are seeking to participate in a programme, not to purchase a product or service. The greater the distance between the method of participation itself and the charging mechanism for that participation, the more likely that the programme will appear to be 'selling' a product or service, rather than simply enabling audiences at home to take part. The proposed new rules would help maintain a distinction between programme-based participation and continuing commercial activity such as might be operated by conventional teleshopping.
- 6.26 If a service did not contribute to the editorial content, it could not be promoted on air unless it fulfilled the definition of programme-related material set out in Section 10 of the Broadcasting Code, i.e. "...products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme." Further guidance on what comprises PRM is provided on Ofcom's website⁴³.
- 6.27 Under this option, it is arguable that quiz TV entries, the great majority of which do not make it to air, should nevertheless be considered as direct contributions to editorial. The rationale for treating quiz entry in this way would be viewer expectation. Competition-based prize schemes (as opposed to the promotional distribution of gifts, for example) are commonly understood to entail numbers of entrants trying and failing: the contribution to editorial is not decided by each participant but by the framework of the scheme as a whole.

Benefits

- 6.28 Setting out simple but rigorous rules and providing detailed explanatory guidance would bring clarity and certainty to dedicated PTV as a sector, and more widely to other participation-based broadcasting. These rules would ensure the separation principle is maintained, as required by European legislation.
- 6.29 Option 2 is a variation on – and arguably a clarification of - existing practice, so should not result in a greatly increased regulatory burden for licensees. It would ensure consistency with the separation principle but would also provide scope for dedicated PTV without necessarily requiring significant changes to all parts of the sector. For example, to date, interaction and payment tend to be by means of PRS with payment by credit card currently being an exception. In addition, a number of existing licensees have already advised Ofcom that all calls do directly contribute to editorial content and that they do not promote off-screen services on air.

Disadvantages

- 6.30 Some dedicated PTV services, notably psychic and adult chat services, may need to change their business models, at least to some extent. Psychic services would be faced with the choice of complying with the criteria or ceasing to broadcast, since such material is proscribed under advertising rules. Adult chat services would be faced with a similar choice, although there is a possibility that they could become encrypted adult services and thereby avoid the advertising prohibition.

⁴³ http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance10_131206.pdf

- 6.31 Existing dedicated PTV services currently classed as editorial that could meet neither the tighter criteria nor adjust to advertising status could not continue.

Option 3

Classed as editorial, but carrying labelling

- 6.32 Under Option 3, new rules would be added to Section 10 of the Broadcasting Code, under which, subject to the inclusion of an on-screen label to ensure that the nature of the content was transparent to viewers, the offer of both on- and off-screen services would be allowed and a wider range of payment mechanisms would be permitted. The label would ensure that viewers understood the commercial nature of the content, whilst other limitations under the rules would ensure that it was differentiated from straightforward advertising such as teleshopping.
- 6.33 The draft new rules under Option 3 are as follows (they are also set out in Annex 6):

Draft new rules to be added to Section 10 of the Broadcasting Code

Participation in programmes

Rules 10.19 and 10.20 apply only to television programmes predicated on viewers' paid participation ("dedicated participation programmes").

10.19 *Dedicated participation programmes must carry a permanent and static text statement, agreed by Ofcom and of a prescribed size, that explains the nature of the content.*

10.20 *Provided that viewers contribute directly to or otherwise influence its editorial content, a dedicated participation programme may also promote additional services. However, any such additional services must only exist because of, and for the duration of, each caller's interaction. No dedicated participation programme may use a caller's number to generate further contact.*

Guidance on dedicated participation programmes

Rules 10.19 and 10.20 apply only to those television programmes predicated on viewers paying for participation, that is those television programmes whose primary purpose appears to Ofcom to be to encourage viewer participation in return for payment. Currently, payment tends to be by premium rate telephony. However, payment by other means (for example, debit or credit card) is not prohibited by Rules 10.19 and 10.20.

Examples include TV quizzes, adult chat and psychic readings.

These programmes usually have the following characteristics:

- *prominent and frequent messages to viewers to call (or text) one or more premium rate numbers; and*
- *the telephone number is permanently displayed on screen.*

Mainstream, general entertainment programmes (for example, magazine-formats, studio-based game shows and reality shows) that simply involve an element of

viewer participation are unlikely to be considered to be dedicated participation programmes.

Guidance on Rule 10.19

Ofcom considers that the text statement must say:

“This programme/channel is funded by your calls or other payments that you make. You may be offered, and charged for, services other than taking part in the programme. Please read the charging information carefully.”

This statement must be:

- *permanently displayed throughout the relevant broadcast;*
- *static (not scrolling or flashing, for example); and*
- *comply with BCAP’s Guidance on On-Screen Text and Subtitling in Television Advertisements.*

Guidance on Rule 10.20

Provided that there is a clear and significant element of direct participation in the programme, dedicated participation programmes may also promote additional services. Permitted additional services will usually be telephony-based (voice, text or picture). They may include off-screen chat services or other activity which does not directly contribute to the editorial content of the programme.

Dedicated participation programmes must not use a caller’s number to generate further contact, whether by voice service, SMS, MMS or other means.

- 6.34 Whilst such content would still be subject to the Broadcasting Code, the existing rules in Section 10 of the Code would be interpreted appropriately.
- 6.35 Unlike Option 2, under this option it would be permissible to charge by, for example, credit or debit card or to allow viewers to operate specific accounts. These means of payment could be referred to on-screen.
- 6.36 The content must include participation by viewers which either directly contributes to or influences the editorial. However, because the content would be clearly labelled, there would be greater scope for off-screen activity. A participant could opt to receive a service that did not contribute to editorial, e.g. an off-screen conversation. However, as with Option 2, a PTV service could not contact a caller at some later time to initiate or encourage the use of the service, or use their details to send text or other messages.

Benefits

- 6.37 As discussed earlier, dedicated PTV represents a new revenue model: programmes and channels funded not by spot advertising or sponsorship sold around programmes but by viewers’ willingness to take part in them. It may therefore be argued that, despite the inherent level of commercial activity, it is proportionate and not discriminatory for such content to be regulated not as advertising but as a type of editorial.
- 6.38 This option provides increased transparency to viewers as to the commercial nature of the content. It also enhances funding opportunities for licensees and prospective licensees. The ability to promote PRM, as permitted under the Broadcasting Code,

would not be affected; however, as with Option 2, licensees should note that the Code and accompanying guidance are strict on the meaning of PRM and the manner in which it may be promoted.

- 6.39 Some live chat PTV services presently operate both on- and off-screen services. This option would allow them to continue to do so, but with sharper boundaries between them and straightforward teleshopping or self-promotional services. The use of such a dedicated PTV service to market itself or to charge participants at other times, typically by 'push' messaging, would be curtailed.

Disadvantages

- 6.40 Option 3 allows a greater degree of commercial activity than is currently permitted without the need for editorial justification in all cases. This raises difficult questions under the separation principle. In addition, it may give rise to concerns that it is discriminatory to allow dedicated PTV services more flexibility than other types of editorial content in terms of undue prominence and other relevant provisions in the Broadcasting Code.
- 6.41 From licensees' point of view, the burden of labelling – which is integral to the option – is likely to make it an option for which the balance of benefits and disadvantages is finely balanced.
- 6.42 Some viewers might initially be confused by the introduction of a new type of editorial content, carrying labelling.

Option 4

Class dedicated PTV services as advertising, i.e. teleshopping or self-promotion

- 6.43 Dedicated PTV services tend to appear to be essentially commercial in nature and this raises at least a question of whether they should be regulated as advertising, i.e. subject to the BCAP Advertising Code⁴⁴, the BCAP scheduling rules⁴⁵ and RADA⁴⁶. Since these services are inevitably long formats they would have to be one of two types of advertising, teleshopping or self-promotion. Any other advertising formats are heavily confined in the amount of time they can occupy within a television service's output – see 'permissible forms of advertising' above. With the exception of the public service broadcasters, licensees providing an editorial service are permitted to carry up to three hours of teleshopping in addition to their advertising minutage allowance.
- 6.44 Where material is categorised as teleshopping or self-promotion – as advertising in other words – it is of course permitted to be clearly commercial. But it must be clearly separated from editorial and, in ambiguous cases, it may be necessary to identify it as advertising, for example by on-screen text.
- 6.45 Because teleshopping is defined, broadly, as advertising involving direct offers for sale, dedicated PTV services so classed would need to contain regular, direct sales messages. As many dedicated PTV services repeatedly invite viewers, by verbal

⁴⁴ Available at http://www.asa.org.uk/asa/codes/tv_code/tv_codes/

⁴⁵ Available at http://www.asa.org.uk/asa/codes/tv_code/scheduling/

⁴⁶ Available at <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/>

and visual means, to call a premium rate number, this requirement may well be readily satisfied.

- 6.46 Classification as self-promotion would not attract the requirement for regular direct sales messages, although the acceptable limits of such content under European law – including the amount of teleshopping material allowed on self-promotional services – are unclear.
- 6.47 Channels and programmes currently operating as editorial and therefore regulated under the Broadcasting Code, and new, similar channels and programmes, might well require labelling under Option 4 if it were not obvious that they were now classified as advertising. Rules in the BCAP Advertising Code and RADA require positive labelling of advertising material not readily identifiable as such.
- 6.48 It should be noted that dedicated PTV licensees and other licensees carrying such content who wish to adopt teleshopping status could already do so under the present arrangements, subject to meeting all the relevant requirements (including advertising proscriptions). None have done so.

Benefits

- 6.49 The audience research commissioned by Ofcom suggests that dedicated PTV services have an audience who enjoy watching them and who understand that they involve commercial transactions. However, this option would enhance clarity for consumers, especially if basic labelling is applied. For the regulators, this option would mean a clear division between services that incorporated an element of participation within a framework of clear editorial output (which would continue to be regulated by Ofcom as programmes) and those predicated on viewers paying to participate (usually by means by PRS), i.e. dedicated PTV (which would now be regulated by ASA and BCAP as advertising). For the same reasons, licensees would have a surer understanding of the regulatory regime within which they would be operating.
- 6.50 In an area of broadcasting predicated on the promotion and use of PRS and therefore involving frequent commercial transactions, it is arguable that the BCAP Advertising Code, because of its rules that prevent misleading advertising, is more appropriate as a means of protecting consumers.

Disadvantages

- 6.51 Dedicated PTV psychic and adult chat services would be adversely affected because of the prohibitions in the BCAP Advertising Code. Adult chat services could operate under encryption. In addition, the advertising minutage rules would severely constrain licensees' ability to provide dedicated PTV content as part of an editorial service. This would be particularly acute for public service broadcasters currently providing quiz TV services.
- 6.52 Quiz TV services are already subject to detailed regulation intended to protect consumers. In addition, the licence variation discussed in Section 4 (and set out in Annex 5) would ensure increased viewer and consumer protection in all PTV, not only dedicated PTV.
- 6.53 Practical difficulties in the transfer of responsibility for regulation of dedicated PTV from Ofcom to ASA/BCAP would be likely.

Draft amendments to Broadcasting Code

- 6.54 Draft amendments to the Broadcasting Code and draft new guidance in respect of Options 2 and 3 are set out in Annex 6.

Other regulatory activity

- 6.55 Notwithstanding the options set out above, stakeholders should note that there is other regulatory activity in this area that is independent of Ofcom's consultation; this is discussed below:

Are quizzes lotteries?

- 6.56 On 29 June 2007, the Gambling Commission ('GC') issued guidance on the distinction under the Gambling Act 2005 (which comes into force on 1 September 2007) between lotteries on one hand and prize competitions and free draws on the other and where the boundaries will lie⁴⁷. It queried in particular whether some TV quiz services as currently operated will fall to be treated as lotteries under the new provisions in the 2005 Act.
- 6.57 Lotteries require payment to enter and also allocate prizes according to chance, rather than by skill. Schedule 2 of the Gambling Act 2005 deals with what is and what is not to be treated as payment for the purposes of that distinction. Paragraph 8 of that Schedule deals with cases in which there is a choice of entry route. It states that such schemes:

"shall not be treated as requiring persons to pay in order to participate if under the arrangement:

(a) each individual who is eligible to participate has a choice whether to participate by paying or by sending a communication,

(b) the communication mentioned in paragraph (a) may be:-

(i) a letter sent by ordinary post, or

(ii) another method of communication which is neither more expensive nor less convenient than entering the lottery by paying,

(c) the choice is publicised in such a way as to be likely to come to the attention of each individual who proposes to participate, and

(d) the system for allocating prizes does not differentiate between those who participate by paying and those who participate by sending a communication."

- 6.58 The GC has questioned whether free web entry in quiz TV will satisfy the above tests by providing a satisfactory alternative 'free' route, although it recognises that the facts may vary from case to case.
- 6.59 If a quiz does not satisfy the tests set out in Schedule 2 of the Gambling Act 2005 (and is therefore considered to require payment to enter) and, if it also allocates prizes by chance, then it is a lottery. The GC has commented that, in quiz TV, the

⁴⁷ Available at <http://www.gamblingcommission.gov.uk/Client/detail.asp?ContentId=194>

caller who gets through to the studio is determined randomly rather than through skill; this first 'process' in the quiz TV mechanic therefore turns upon chance.

- 6.60 Whether quiz TV services are lotteries under the Gambling Act is a matter for the GC (and ultimately the courts), and not for Ofcom. However, there are clear consequences in terms of broadcasting regulation. If quiz TV services are considered to be lotteries, then it is difficult to see how the broadcast of lotteries (including coverage of the lottery in operation and discussion with winners) would be acceptable as editorial content under the Broadcasting Code. Such content would appear to be promoting a product, i.e. a lottery. It would therefore be a form of advertising and would need to comply with all the relevant rules, including advertising minutage.
- 6.61 The GC's guidance also considered viewer competitions integrated within programmes, the key issue here being whether the competitions (which commonly involve a choice of three different answers) meet the test in the 2005 Act for them to qualify as prize (or skill) competitions.
- 6.62 The GC has indicated that it will continue to consider these matters, in discussion with key stakeholders, especially broadcasters. Ofcom would advise broadcasters to consider the GC's guidance extremely carefully.

Potential significance of ECJ decision

- 6.63 There is currently a case before the European Court of Justice (the 'ECJ') concerning the categorisation of a TV quiz show broadcast on Austrian television by the Austrian public service broadcaster, ORF. The Austrian Federal Communications Board (the 'FCB') has referred questions to the ECJ on the interpretation of the meaning of 'teleshopping' and 'television advertising' under the TWF Directive. The case concerns a programme called 'Quiz-Express' where members of the public can call a premium rate telephone number to participate in a prize game.
- 6.64 The definition of 'teleshopping' is set out at Article 1(f) of the TWF Directive as "direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment."
- 6.65 'Television advertising' is defined in Article 1(c) as "any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment."
- 6.66 The FCB has referred two questions to the ECJ:
- Does 'teleshopping' include broadcasts, or parts of broadcasts, in which the broadcaster offers the viewer the opportunity to participate in the broadcaster's prize games by means of a premium rate telephone number, and thus in return for payment?
 - If the answer to that first question is 'no', does 'television advertising' include announcements in broadcasts, or parts of broadcasts where the broadcaster offers the viewer the opportunity to participate in the broadcaster's prize games on the terms set out above?

- 6.67 The UK made oral submissions to the ECJ in this case. Subsequently, in his opinion, the Advocate General suggested that a particular show should be considered as ‘teleshopping’ if the principal aim is to sell the right to participate in that game. In this regard, the national court should take into account, in particular, the following criteria: a) the principal purpose of the broadcast, b) the economic importance of the game, c) the time devoted to it, and d) the number of viewers who call in.
- 6.68 A final ruling on the case is expected later this year.
- 6.69 The potential implications for UK broadcast licensees are extremely significant: it may be that, irrespective of the outcome of Ofcom’s PTV consultation, quiz TV – and indeed other PTV content – will need to be reclassified and regulated as teleshopping rather than editorial.

Questions

- 6.70 Ofcom would welcome stakeholders’ views on each of the options identified above. Questions are set out below (and repeated in Annex 4; see Annexes 1, 2 and 3 on how to respond):

Which of the options proposed in Section 6 do you believe is most appropriate to ensure separation of advertising from editorial content? Please explain why.

Do you have any comments on the draft new rules and guidance in respect of Options 2, 3 and 4 set out in Annex 6? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

Do you agree that Option 2 clarifies the existing provisions of the Broadcasting Code and therefore should not be limited to dedicated PTV only, but should apply to all editorial content (on both television and radio) which invites viewers to pay to take part? Please give reasons.

Has Ofcom correctly identified, in Section 6 and the Impact Assessment in Annex 7, the various impacts arising from each option for dedicated PTV? Again, please give reasons.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 12 pm on 17 October 2007**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/participationtv/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email participationtv@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Yvonne Matthews
5th floor
Content and Standards
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3806
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Ritu Manhas on 020 7981 3853.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement before the end of 2007.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Protection of viewers and consumers in all PTV

Q1. Do you agree that television broadcasters should be directly responsible for PRS in programmes and also for other forms of communication where viewers seek to interact with programmes? Please explain why.

Q2. If so, do you agree that a variation to television licences would be the most appropriate way of ensuring that broadcasters are responsible for such PRS compliance?

Q3. Do you agree that there is a need for broadcasters to obtain independent, third-party verification that they are in fact complying with the draft licence obligations set out in Paragraph 2 of the draft licence variation? If so, which of the options for verification discussed in Section 4 do you think is most appropriate? Are there other appropriate options? Again, please provide reasons.

Q4. Do you have any comments on the draft licence variation set out in Annex 5? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

Q5. Do you agree that the draft licence obligations should not be limited to television but should also apply to radio broadcasters? Please provide reasons.

Separation of editorial and advertising in dedicated PTV

Q6. Which of the options proposed in Section 6 do you believe is most appropriate to ensure separation of advertising from editorial content? Please explain why.

Q7. Do you have any comments on the draft new rules and guidance in respect of Options 2, 3 and 4 set out in Annex 6? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

Q8. Do you agree that Option 2 clarifies the existing provisions of the Broadcasting Code and therefore should not be limited to dedicated PTV only, but should apply to all editorial content (on both television and radio) which invites viewers to pay to take part? Please give reasons.

Q9. Has Ofcom correctly identified, in Section 6 and the Impact Assessment in Annex 7, the various impacts arising from each option for dedicated PTV? Again, please give reasons.

Annex 5

Draft licence variation

- 1 The Licensee shall retain responsibility for all arrangements for the management of communication, including telephony, between members of the public and the Licensee or the Licensee's contractors or agents (together here described as "the Licensee") where such communication is publicised in programmes.
'Communication' includes, but is not limited to, methods of communication in which consideration is passed between a member of the public and the Licensee directly or indirectly and methods of communication intended to allow members of the public to register with the Licensee indications of preference or intended to allow entry to any competition, game or scheme operated by the Licensee.
- 2(a) Arrangements for the management of methods of communication publicised in programmes and intended to allow communication between members of the public and the Licensee must ensure that:
 - i) reasonable skill and care is exercised by the Licensee in the selection of the means of communication and in the handling of communications received, such that the possibility of reasonably foreseeable disadvantage to members of the public is minimised. 'Disadvantage' includes, but is not limited to detriment arising from shortcomings in communications networks and processes and other technical processes;
 - ii) voting, competitions, games or similar schemes are conducted in such ways as to provide fair and consistent treatment of all eligible votes and entries and to minimise reasonably foreseeable disadvantage to members of the public. 'Disadvantage' includes, but is not limited to, detriment arising from inadequate arrangements for the transmission, reception and processing of votes and entries so as to render them ineligible by time or other reason;
 - iii) prominent and comprehensive pricing information is included in publicity in programmes in a way compatible with any guidance issued from time to time by Ofcom; and
 - iv) publicity in programmes for voting, competitions, games or similar schemes is not materially misleading.
- (b) In addition to the requirements in sub-paragraph 2(a), the Licensee shall ensure that the provisions of the code approved by Ofcom for regulating the provision of premium rate services, or in the absence of such a code, the terms of any order made by Ofcom for such purposes, are observed in the provision of the Licensed Service.

Option A: Independent verification to be in a form decided by the Licensee and only provided upon request

- 3 The Licensee shall implement and maintain appropriate compliance procedures to ensure arrangements for the management of methods of communication publicised in programmes and intended to allow communication between members of the public and the Licensee fulfil all the requirements set out in paragraph 2 above. Such compliance procedures shall be tested and verified by an independent third party on a regular basis. Upon request by Ofcom, the Licensee shall provide to

Ofcom an appropriate report which provides the results of the independent verification of the Licensee's procedures and compliance with the requirements set out in paragraph 2 above.

Option B: Independent verification to be in a form decided by the Licensee and provided at specified times

- 3 The Licensee shall implement and maintain appropriate compliance procedures to ensure arrangements for the management of methods of communication publicised in programmes and intended to allow communication between members of the public and the Licensee fulfil all the requirements set out in paragraph 2 above. In addition, the Licensee shall implement an appropriate scheme for an independent third party to test and verify [annually] the Licensee's procedures and compliance with the requirements of paragraph 2, and submit [on an annual basis] an appropriate report to Ofcom.

Option C: An annual audit in accordance with a detailed specification

- 3 The Licensee shall implement and maintain appropriate compliance procedures to ensure arrangements for the management of methods of communication publicised in programmes and intended to allow communication between members of the public and the Licensee fulfil all the requirements set out in paragraph 2 above. In addition, the Licensee shall implement a scheme, as specified by Ofcom, for an independent third party to audit annually the Licensee's compliance procedures and compliance with the requirements of paragraph 2, and shall submit on an annual basis an appropriate report to Ofcom.

Annex 6

Dedicated PTV options – draft rules and guidance under the Broadcasting Code

Option 2: Classed as editorial, subject to new rules

Amendments to Section 10 of the Broadcasting Code, Commercial references in programmes

Premium rate numbers

10.9 Premium rate numbers (and their equivalents) will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they ~~form part of~~ enable viewers or listeners to participate in or otherwise directly contribute to or influence the editorial content of the programme (see Rule 10.11);
- they fall within the meaning of programme-related material (see above).

10.10 Where a viewer or listener is charged for participation in a programme, the broadcaster must ensure that the viewer or listener is charged at the same time as the participation takes place and by the same process.

10.11 Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).

Guidance on Rule 10.10

Method of participation and payment

At this time, Ofcom considers that, in practice, the only acceptable means of participation and charging of viewers/listeners, for the purposes of Rule 10.10 are telephony-based applications (including SMS and MMS) and 'red button' technology. Payment by cash, cheque, credit card or money transfer is not permitted.

Participation must directly contribute to or influence editorial content

In considering whether participation directly contributes to or influences the editorial content of a programme, broadcasters should note the following:

- In chat-based dedicated PTV, e.g. adult chat and psychic, voice calls must be taken by presenters on-air; such calls need not be audible to all viewers. However, callers must not be invited to call or to be diverted to off-screen services, e.g. a call centre.
- Dedicated participation programmes must not use a caller's number to generate further contact, whether by voice service, SMS, MMS or other means.

- Off-screen services may only be promoted in programmes where they are 'programme-related material' ("PRM") as defined in the Broadcasting Code. Promotion of PRM is strictly regulated under the Code; continual promotion throughout a programme is unlikely to be acceptable.
- Particular care must be taken with pre-recorded content which encourages viewers or listeners to participate, as it will often be unclear how viewers or listeners are in fact able to contribute to or influence that content.

Dedicated participation TV ('dedicated PTV')

This term is used in the guidance to refer to those television channels and programmes that are clearly predicated – in terms of both the content itself and the funding of that content - on participation by viewers in return for payment. Currently, payment tends to be by premium rate telephony although other funding models may emerge. Examples of dedicated PTV include quiz TV, adult chat TV and psychic TV.

Dedicated PTV usually has the following characteristics:

- prominent and frequent messages to viewers to call (or text) one or more premium rate numbers;
- the telephone number is constantly, or almost constantly, displayed on screen.

Option 3: Classed as editorial, but carrying labelling

New rules to be added to Section 10 of the Broadcasting Code

Participation in programmes

Rules 10.19 and 10.20 apply only to television programmes predicated on viewers' paid participation ("dedicated participation programmes").

10.19 Dedicated participation programmes must carry a permanent and static text statement, agreed by Ofcom and of a prescribed size, that explains the nature of the content.

10.20 Provided that viewers contribute directly to or otherwise influence its editorial content, a dedicated participation programme may also promote additional services. However, any such additional services must only exist because of, and for the duration of, each caller's interaction. No dedicated participation programme may use a caller's number to generate further contact.

Guidance on dedicated participation programmes

Rules 10.19 and 10.20 apply only to those television programmes predicated on viewers paying for participation, that is, those television programmes whose primary purpose appears to Ofcom to be to encourage viewer participation in return for payment. Currently, payment tends to be by premium rate telephony. However, payment by other means (for example, debit or credit card) is not prohibited by Rules 10.19 and 10.20.

Examples include TV quizzes, adult chat and psychic readings.

These programmes usually have the following characteristics:

- prominent and frequent messages to viewers to call (or text) one or more premium rate numbers; and
- the telephone number is permanently displayed on screen.

Mainstream, general entertainment programmes (for example, magazine-formats, studio-based game shows and reality shows) that simply involve an element of viewer participation are unlikely to be considered to be dedicated participation programmes.

Guidance on Rule 10.19

Ofcom considers that the text statement must say:

“This programme/channel is funded by your calls or other payments that you make. You may be offered, and charged for, services other than taking part in the programme. Please read the charging information carefully.”

This statement must be:

- permanently displayed throughout the relevant broadcast;
- static (not scrolling or flashing, for example); and
- comply with BCAP’s Guidance on On-Screen Text and Subtitling in Television Advertisements.

Guidance on Rule 10.20

Provided that there is a clear and significant element of direct participation in the programme, dedicated participation programmes may also promote additional services. Permitted additional services will usually be telephony-based (voice, text or picture). They may include off-screen chat services or other activity which does not directly contribute to the editorial content of the programme.

Dedicated participation programmes must not use a caller’s number to generate further contact, whether by voice service, SMS, MMS or other means.

Annex 7

Impact Assessment

Introduction

- A7.1 This annex when read in conjunction with the rest of this consultation document, in particular Sections 4 and 6, represents an Impact Assessment ('IA'), as defined by Section 7 of the Communications Act 2003 ('the Act'). IAs form part of best practice policy making and are commonly used by other regulators. This is reflected in Section 7 of the Act, which means that generally Ofcom has to carry out IAs where our proposals would be likely to have significant effect on businesses or the general public, or where there is a major change in Ofcom's activities. In accordance with Section 7 of the Act, in producing this IA, Ofcom has had regard to such general guidance as it considers appropriate, including related Cabinet Office guidance and its own IA guidelines⁴⁸.
- A7.2 Given the degree of uncertainty around the scale of the PTV sector, there are inherent difficulties in seeking to quantify the potential costs and benefits of different regulatory measures. Where possible, Ofcom has sought to quantify the likely costs and benefits. Where that has not proved possible, Ofcom has instead attempted to describe the nature and likely magnitude of the costs and benefits.
- A7.3 The IA is divided into two sections. The first section considers the potential impact of recommendations coming out of the Inquiry into the use of PRS in television programmes ('the Inquiry'), specifically the proposed licence variation. The second section considers the potential impact of different approaches to the issue of the separation between editorial and advertising content in relation to dedicated PTV services.

Impact of proposed licence variation

Nature of Proposals

- A7.4 The core recommendation of the Inquiry is that broadcasters' licences should be varied to make them directly and widely accountable for the use of PRS in programmes ('the key recommendation'). The Inquiry recommended that the licence variation should include an obligation to put in place independent third-party auditing. However, whilst Ofcom agrees that some degree of independent verification is important, it remains open as to the form of that verification. This consultation paper therefore has included a range of options.
- A7.5 Other, secondary recommendations cover various areas of good practice in the conduct of competitions and votes and in the display of pricing. The Inquiry suggests these be adopted as guidance to the Broadcasting Code or licences; however, these secondary recommendations are being considered separately by Ofcom and are not part of the PTV consultation.

Benefits

- A7.6 The Inquiry has found not only that the public trust in broadcasters' ability properly to handle PRS interactions is very low indeed but also that there is clear evidence

⁴⁸ http://www.ofcom.org.uk/consult/condocs/ia_guidelines/condoc.pdf

that general trust in broadcasters has been badly affected by coverage of PRS compliance failures.

- A7.7 The key recommendation is aimed at addressing concerns about the failures of compliance by codifying the responsibility of broadcasters in the form of a specific licence condition.
- A7.8 The most significant benefits therefore relate to restoring viewer confidence in the operation of PTV. This should encourage viewers to participate in television programming – be it in the form of participating in quizzes or voting in television polls – and a restoration in the volume of viewer participation will lead directly to financial benefits to broadcasters.
- A7.9 ITV has already announced⁴⁹ that PRS revenues were some 20 per cent lower in March and April 2007 and that there were concerns as to whether consumer confidence would recover. If we were to assume that this pattern was repeated across other broadcasters then – based on the Mediatique report's⁵⁰ estimates of the size of the quiz TV component of the sector - that might equate to revenues being some £17m lower in 2007 than would otherwise have been expected. There would be an additional loss of revenues in relation to premium rate voting as well, although the Mediatique report did not attempt to quantify the revenue derived from premium rate voting *per se*.
- A7.10 On that basis, if the key recommendation is successful in restoring consumer confidence this could be worth overall in the order of £17m per year to broadcasters. The benefit could be greater to the extent that restoring confidence in the sector would enable broadcasters to continue to develop PRS as an additional source of revenue.

Costs

- A7.11 In the first instance, Ofcom would expect that making the broadcaster formally responsible for compliance and imposing clear licence obligations on broadcasters should not impose any significant incremental costs on broadcasters, as – certainly in respect of PRS applications and competitions – broadcasters are already required to comply with the Broadcasting Code. Broadcasters already have compliance staff and so this proposal should really be a matter of providing clarity as to where responsibility ultimately sits.
- A7.12 The requirement for independent verification would be likely to impose some additional costs on broadcasters. It is difficult to estimate the scale of these costs with any certainty. Also, Section 4 includes a range of options for such verification, and the costs in each case are likely to vary. However, Ofcom notes that a number of broadcasters have recently gone through lengthy audit processes in response to the concerns raised around the conduct of phone-in competitions etc. Ofcom would therefore expect that broadcasters will start any requirement to put in place an on-going verification process with a 'clean slate' i.e. any existing compliance issues should have been identified and addressed through these prior audit processes. This should therefore reduce the magnitude of the costs imposed by any on-going verification obligation. Depending on the precise nature of the verification requirements, Ofcom would expect the cost to be limited to being in the tens of thousands of pounds per broadcaster.

⁴⁹ ITV plc Annual General Statement 17 May 2007

⁵⁰ See <http://www.ofcom.org.uk/consult/condocs/participationtv/marketoverview.pdf>

Conclusion

A7.13 Given the scale of the benefits from a restoration of consumer confidence in participation TV (e.g. potentially in the order of £17m per annum as indicated above), Ofcom would expect these benefits to outweigh any costs imposed through a verification requirement.

Impact of dedicated PTV options

A7.14 This section of the IA focuses on the impact on dedicated PTV channels or services of the different approaches to the issue of the separation between editorial and advertising content. The IA draws upon a number of sources of information, in particular, the Mediatique's report, responses to the 2006 Issues Paper and to Ofcom's formal information request to dedicated PTV broadcasters; and research commissioned by Ofcom⁵¹.

A7.15 The emergence of dedicated PTV services is a relatively recent phenomenon: although some services have been operating since 2001, the majority of services launched in the period 2005-2006. The growth of dedicated PTV services has been influenced by a number of factors, including (but not limited to): the need for broadcasters to develop alternative revenue streams to reduce their dependence on the sale of advertising airtime; the appetite of viewers for participation formats combined with the ability to monetise this through the use of premium rate telephony services; and the reduced cost of launching services on digital satellite.

A7.16 Ofcom understands that using premium rate telephony offers channel providers a cheaper route to market compared to other alternatives for delivering interactive services, such as making use of red-button interactivity. Service providers have suggested to Ofcom that, per application, red button facilities are expensive to set up and run. In addition the phone bill is a familiar billing mechanism to consumers and does not require service providers to get involved in handling payments directly.

A7.17 The principal means of distribution of dedicated PTV channels is by means of the digital satellite platform – based on the information received by Ofcom, there are no services which are exclusive to the cable or the DTT platforms. In fact there are only a limited number of such services on the latter two platforms: ITV Play was the only specific dedicated PTV service available via DTT but ITV announced in March 2007 that it would be withdrawn. Where dedicated PTV services are available on the cable and DTT platforms, it tends to be where channels carry a simulcast of a dedicated PTV service at certain times of the day.

A7.18 At the time of the Mediatique report, there were three standalone services providing quiz TV channels in the UK on the satellite platform with an additional 22 channels carrying blocks of quiz TV content. However, there has recently been significant shakeout in the quiz TV sector with all of the standalone dedicated quiz channels exiting the market. This means that the immediate focus of this section in terms of quantifying the impact will be the impact on the adult chat and psychic services. The Mediatique report noted that there were a further 14 chat services (including adult chat TV and psychic TV services) and four channels of dating services.

A7.19 In terms of the general business models of the different PTV services, there is an important difference between chat services and quiz TV channels. In the case of

⁵¹ See <http://www.ofcom.org.uk/consult/condocs/participationtv/research>

chat services, they typically charge on a pence per minute (ppm) basis whereas the quiz channels charge a 'drop' charge or a per call charge. This approach to charging reflects the nature of the service; chat services aim to keep the caller engaged in conversation with an on-screen presenter or off-screen operator whereas a quiz channel aims to generate volume of calls.

- A7.20 This in turn can have important implications for the way in which the service is set up and the costs that are incurred. For instance, the call handling infrastructure for a chat service may be dimensioned to handling between 500-1,500 calls per day and the service is set up to connect callers either to on-screen presenters or off-screen operators⁵². According to operators of these channels, viewers who choose to participate might call in between 2-5 times a month on average and the calls would last for several minutes.
- A7.21 In contrast the call handling infrastructure for a quiz channel may be dimensioned to handle a significantly higher volume of calls per day with the capability to handle particular 'spikes' in calling volumes. The call handling systems would be set up simply to register a call and there will typically be specific consumer protection measures in place e.g. to monitor viewers who may call multiple times per day and to have spending cap mechanisms in place.
- A7.22 The overall PRS sector in the UK is thought to be worth in the order of £1.6bn per annum and to involve some 30,000 service providers but estimating the size of the PRS TV segment is difficult. The Mediatique report has estimated that – in 2007 - the overall PTV sector would generate around £118m in total gross revenues i.e. the amount spent by consumers (including VAT). Within this, quiz TV would be the largest single category accounting for around £87m in gross revenues; with adult chat TV services accounting for about £15m; psychic TV services about £5m and other dating services around £11m.
- A7.23 Against a backdrop of relatively low barriers to entry and a proliferation of services over the last few years, Ofcom notes that within the dedicated PTV segment dedicated quiz services have faced increased competition from the main PSB introducing quiz services for at least some of their transmission hours e.g. the ITV Play segment on ITV1 between midnight and 4am. In fact financial data published by the PSBs would tend to suggest that ITV1, GMTV, and five together account for the bulk of the revenue generated in the quiz TV segment of the market.
- A7.24 It should be noted that dating services are already treated differently from other dedicated PTV services – they are already treated as advertising - and so are not discussed in detail in this document. This IA focuses on the impact of the separation issues on quiz TV, adult chat TV and psychic TV.

Flow of Funds

- A7.25 For services based on premium rate telephony, there would typically be five distinct elements in the supply chain for the provision of a channel or service, although a firm can operate across more than one of these elements. The five elements of the supply chain for PRS television services are:

⁵² Callers to adult or psychic chat services will typically be presented with three options: to speak to an on-screen presenter in the studio; to speak to an off-screen operator; or to listen in on an on-going conversation with an on-screen presenter.

- The Originating Network Operator: the telco that has the billing relationship with the viewer making the call.
- The Terminating Network Operator: the telco that sells/hosts the PRS numbers to service providers.
- The Transaction Network Operator: the service provider that provides the call handling, interactive voice services.
- The Producer: the firm that creates the content around the PTV service and produces the service, including providing on-screen graphics
- The Channel Operator/Broadcaster: distributes the programming, determines the schedules and has the relationship with platform operators.

A7.26 In terms of the flow of funds, the share of voice revenue for a call from a fixed line for different types of voice calls would typically be structured as follows.

Service Component	Quiz TV: 75p drop charge call	Chat-based services: £1.50ppm call charge
VAT Component	15p	22p
Originating Network Operator (assumed to be BT)	2p	3-4p
Terminating Network Operator	3p	3p
Transaction Network Operator	2p	4-5p
Producer/Broadcaster	54p (72%)	117p (78%)

A7.27 The table indicates that for calls from fixed lines, the producer/broadcaster receives the bulk of the revenue generated by calls to dedicated PTV services – around 75%. It should be noted that the above figures are intended to be indicative of the distribution of revenues across the supply chain – the actual distribution between terminating operator, transaction network operator and producer/broadcaster will tend to depend on specific contractual arrangements⁵³ but the basic position that the producer/broadcaster is the main beneficiary of the revenue sharing arrangements holds true.

A7.28 For other forms of PRS e.g. text messaging from mobile networks, the value chain would be structured in a similar way but the distribution of revenues would tend to differ in that originating network operators tend to keep a greater share of the revenue net of VAT. However, the Mediatique report estimated that only around 10% of total PTV revenues were derived from text messaging (i.e. SMS/MMS).

⁵³ For instance, Ofcom is aware of instances where the producer/broadcaster receives 80% of the revenue.

Assessment of Competition

A7.29 The growth of the dedicated PTV segments has taken place over the last four or five years, with a particular proliferation of channels in the 24 months to the end of 2006.

Barriers to Entry

- A7.30 Based on information provided to Ofcom, it would appear that barriers to entry are low across the different types of dedicated PTV service. For instance, for new entrants, the main set-up costs that would need to be incurred ahead of launch would include the acquisition/rental of studio facilities; contracting for the provision of uplink/transmission/EPG arrangements; and finally contracting for the software/IT costs e.g. the call handling facilities. Service providers have indicated that putting these different elements into place was not necessarily difficult to achieve and could be accomplished within 6-9 months. In total the set-up costs were estimated to be in the order of £250,000-450,000 although some of these costs actually include on-going costs in terms of studio facilities, transmission capacity, EPG costs etc.
- A7.31 In terms of on-going costs, there would be on-going annual capacity/transmission costs and production costs which are largely fixed costs. However, the next largest component of costs tends to be staff costs and with many broadcasters using freelance staff, a large component of staff costs would tend to be variable. For quiz channels, prize money could also be an important (variable) element of the cost base.
- A7.32 In its report for Ofcom, Mediatique estimated that the costs of a channel would be in the range £0.5m-1.6m depending on the type of service, the quality of production etc. Dating channels would tend to have the lower cost base in that they are largely text based services and so most of their costs would be transmission related whereas quiz TV channels would have a higher cost base in terms of having to pay for formats and prize money in addition to staff costs/presenter costs.
- A7.33 Ofcom notes that the pricing of dedicated PTV services tended to be broadly similar within the different types of service – e.g. quiz TV services tended to be priced at 75p per call while chat services tend to be £1.50 per minute. However, this may in part a function of the tariff bands that are available for PRS services.
- A7.34 Set against the information in relation to on-going costs, the data on profitability is mixed. It is certainly the case that from data provided to Ofcom, that most quiz and adult chat TV services have reported profits in the first 12-24 months of operation. However, some services indicated that they were still in a start-up phase and were loss-making although without a detailed breakdown of costs it was difficult to assess the validity of such claims.
- A7.35 The evidence would tend to indicate that – to date – barriers to entry have been low and that this has led to a proliferation of services over the last few years. In relation to chat services, there do not appear to be any particular issues in relation to one channel or firm having market power. In relation to quiz TV services, there has been a shakeout of the market - with a number of firms exiting in 2007 – but that appears to have been a result of commercial factors rather than the abuse of market power by any one firm or broadcaster.

Prospects for PTV

- A7.36 Going forward, there are three issues for the dedicated PTV sector that could become more significant over time: the risk of viewer boredom; market or segment saturation; and a lack of viewer trust (particularly with regard to quiz TV services).
- A7.37 In terms of viewer boredom, operators of PTV services have talked about the need to refresh the format periodically so that the interest of viewers is maintained and the ideas do not become stale or repetitive.
- A7.38 In the case of market saturation, there could be a natural limit in terms of the number of viewers that are prepared to pay to participate in television programming – the total volume of calls could ‘plateau’. At the end of March 2007, penetration of digital TV in the UK had reached 80.5% which suggests that there is only a limited increase in audience size available as the process of digital switchover moves forward.
- A7.39 Finally, given the recent concerns regarding the way in which quiz TV competitions have been run, the trust of the viewer could be permanently reduced if the core recommendation of the Inquiry is not implemented⁵⁴.
- A7.40 This suggests that, going forward, the PTV segment overall could face more difficult trading conditions and that the prospects for further market entry are limited, particularly in light of Ofcom’s recent findings of breaches of the Broadcasting Code and sanctions against broadcasters.

Rationale for intervention

- A7.41 Ofcom recognises that there are a number of different theories of the role of advertising but one of the roles of advertising is to provide information about a product’s attributes in an attempt to influence viewers’ consumption behaviour. At its very simplest, advertising is used to induce consumers to buy or to buy more of a particular product or service. Television advertising – with its ability to combine audio and visual effects - is considered to be particularly versatile and effective and will typically form the core of any mass advertising campaign.
- A7.42 Given the particular role that television advertising can have in terms of influencing consumer behaviour, there are various rules and regulations which are intended to assist consumers in identifying advertising messages and to protect them from misleading advertising. At the most basic level in broadcasting, there is a requirement to maintain a clear separation between editorial and advertising content. This requirement stems from a desire to avoid viewer confusion i.e. to maintain a clear delineation for viewers between advertising and editorial content so that viewers have a clear understanding of when they are watching conventional programming and when they are watching advertising messages. There may then be additional protections against misleading advertising i.e. even though the advertising is clearly separated from editorial content, there are additional requirements to ensure that the advertising does not convey false information.
- A7.43 This separation requirement is a general feature of content regulation, not just in the UK but across Europe. For instance, the current Television Without Frontiers (‘TWF’) Directive, includes the requirement that advertisements must be clearly

⁵⁴ Research for the Inquiry report suggested that, at least in the short-run, fewer people are likely to participate in programming involving PRS.

identifiable between programmes or in natural breaks. This principle is being carried forward into the Audio Visual Media Services ('AVMS') Directive which will replace the TWF Directive going forward.

- A7.44 In the case of dedicated PTV there would appear to be two potential issues which could be characterised as issues of information asymmetry. The first relates to the maintenance of an appropriate separation between advertising and editorial (e.g. so that on-screen promotional activity relates back to the editorial content rather than simply being an advertising opportunity) and the second concerns the nature of the advertising messages.

Separation of Advertising and Editorial

- A7.45 A key issue - which is common to all dedicated PTV services - is a basic question of whether the services maintain an appropriate separation between editorial and advertising. In respect of this issue, Ofcom is also seeking to determine whether there is an appropriate distinction between promotional activity which contributes to the editorial of the programming and advertising which is not directly related to the on-screen content. This distinction is related not just to the extent to which viewers of dedicated PTV services actually respond to the entreaties of the on-screen presenters to phone in whether it be to a quiz channel or a chat service but also to the extent to which the participatory component is then related to the general content of the service.
- A7.46 It is clear that both quiz services and chat services encourage viewers to phone in: e.g. there is the display of the premium rate phone number on the screen; the on-screen presenters or hosts will also exhort viewers to call in at frequent intervals etc. It is the case that the participatory element of the service contributes to the entertainment provided by the service: viewers do tend to enjoy interacting⁵⁵ with television programming.
- A7.47 However, it is also clear that the proportion of viewers who choose to participate is relatively small. For instance, research by ICSTIS⁵⁶ - which was cited in the recent DCMS select committee report - suggested that while around 38% of those that watch quiz TV had actually taken part at some point, only 6% did so often. Similarly, in evidence to the same select committee, Optimistic Entertainment indicated that only some 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.
- A7.48 In data submitted to Ofcom for chat services a similar point was made that there could be a relatively large number of viewers that chose not to participate in the programming but no estimates of the relative size of this component of the audience were provided. Given the relatively low participation rates for dedicated quiz TV services compared to mainstream services, Ofcom's working hypothesis is that it is a minority of viewers of chat services that actively participate, with the majority of viewers choosing just to watch the programming.
- A7.49 The above discussion of participation rates would suggest that dedicated PTV services perform two functions: the provision of a general 'entertainment' service

⁵⁵ This is not a recent phenomenon. Early examples of this type of participatory element in programming date back to the 1960s: e.g. the Golden Shot on ITV where viewers phoned in to aim a bow at a target in the studio.

⁵⁶ *Call TV Quiz Services Review: Analysis and Consultation Document*, ICSTIS, January 2007.

which might provide a benefit to a relatively broad group of viewers together with a specific participatory service which is likely to be valued by particular groups of viewers. Where there is a participatory element, it needs to contribute to the editorial content of the programming in order to play a role in the general entertainment provided by the service.

A7.50 Against this background, Ofcom considers that its key policy objectives in this area should be:

- To ensure an appropriate separation between advertising and editorial in respect of dedicated PTV services; and,
- To ensure a sufficiently close link between the participatory component of the service and the programme material.

Options

A7.51 Given these policy objectives, Ofcom considers that there are four options available:

- No change (Option 1)
- Require a clearer relationship between promotional messages and editorial content than currently exists in much dedicated PTV (Option 2)
- Require dedicated PTV to be labelled for increased transparency (Option 3)
- Reclassify dedicated PTV services to enforce a separation of advertising and editorial content (Option 4)

A7.52 The fact that these dedicated PTV services have launched, and - in most cases – attracted sufficient viewers/participation rates to have become profitable within a relatively short space of time, would tend to suggest that they provide a service which is valued by at least some viewers (this is supported by the viewer research conducted by Essential for Ofcom⁵⁷). It also implies that intervention which had the effect of significantly restricting or removing such programming would represent a reduction in choice to such viewers. Without a clearly articulated description of the offsetting viewer benefit from such action, this would tend to suggest a presumption against such action.

Option 1: No change

A7.53 Parties applying for a broadcasting licence need to decide whether they wish to operate an editorial service or an advertising service. Ofcom then considers the application. In each case an assessment is made of the nature of the service and, where it involves viewer participation, of which components of the service might be treated as editorial and the degree to which participation contributes to that editorial. Option 1 would essentially preserve the current position whereby dedicated PTV services (including quiz, psychic and adult chat TV services) are, in the main, classed as editorial and regulated under the Broadcasting Code. Option 1 therefore provides the counter-factual against which other options are assessed.

⁵⁷ See <http://www.ofcom.org.uk/consult/condocs/participationtv/research>

- A7.54 The system has the advantage that it is familiar to licensees and would not require existing participants to change their business models.
- A7.55 A disadvantage of the current approach is that the Broadcasting Code is based on the assumption that promotions of services (including PRS) within programmes would be the exception rather than the rule. Dedicated PTV services tend not to fit that model and this gives rise to difficulties in applying the Code in a way that is transparent, consistent and fair to broadcasters.
- A7.56 In terms of the impact of this approach, the Mediatique report estimated that the dedicated PTV sector as a whole has been growing at an annual compound rate of 16% since 2005. However, it is not the case that under Option 1 this rate of growth would necessarily be maintained in the absence of further regulatory intervention – opinions are divided.
- A7.57 A number of channels/services referred to the PTV segment of the market having reached maturity and noted an impact on calling patterns compared to 2006 i.e. call volumes reaching a 'plateau'. It is therefore possible that the current PTV markets are reaching, or have reached, saturation in terms of attracting new viewers. This would of course have a direct impact in terms of impacting on future revenue growth i.e. even in the absence of further regulation, overall revenues for PTV might have reached a plateau.
- A7.58 In addition the recent issues around the operation of quiz TV services in particular could have a significant impact on the growth of the sector if it turns out that they have undermined consumer confidence in the integrity of PTV services as a whole in the long-run. As referred to in the discussion of the impact of the recommendations of the Inquiry, ITV has already indicated that revenues from its ITV Play service were down significantly on 2006 and its other PRS revenues were down some 20% in March and April. There were also concerns about whether consumer confidence in this area would recover. It would be expected that other quiz TV broadcasters would be facing a similar reduction in PRS revenues but it is not clear to what extent there would be an impact on other dedicated PTV chat based services.
- A7.59 Others participants in this sector forecast continued growth, although they are looking to other digital media (e.g. 3G and mobile TV services) to generate revenue growth.
- A7.60 Given the uncertainty about assessing the extent to which the issues in the quiz TV segment of the market might have spilled across into the chat services, Ofcom is proposing at this point to use the revenue figures for 2007 as estimated in the Mediatique report as the counter-factual against which to assess specific regulatory proposals: i.e. under the 'No Change' option, Ofcom would expect the out-turn for the adult chat and psychic services to be in line with the estimates produced by Mediatique. However, taking into account the above discussion about the uncertainty over future prospects for dedicated PTV services, Ofcom recognises that this counter-factual might represent an optimistic view of the sector and that, even under a 'No Change' option, the sector will see a fall off in revenues and profitability.

Option 2: Continue to classify PTV as editorial but with new conditions

- A7.61 This proposal basically maintains the existing system of treating the content of dedicated PTV services as editorial but imposing specific rules or conditions to limit

the degree of commercial activity within such content. Option 2 would in practice limit the nature and charging of the participation to telephony applications; payment by other means (such as credit cards⁵⁸) would not be allowed.

- A7.62 Option 2 would also require that the nature of the participation clearly contributed directly to or influenced the programme's editorial content. For example, there would be a requirement to ensure that any promotional messages – either in terms of scrolling text or prompts by the on-screen host/operator – were restricted to the services available on-screen. For instance, this would mean that adult chat or psychic TV services could not promote or offer access to off-screen chat lines as these do not contribute directly to the programme's editorial content (unless the broadcaster could satisfy Ofcom that such chat lines satisfied the definition of programme-related material in the Broadcasting Code⁵⁹).
- A7.63 The benefits of such an approach would be to ensure greater consistency with the separation principle in that it would tie a participant's interaction much more closely into what was seen or heard on screen while still allowing dedicated PTV services to continue. Option 2 would provide enhanced clarity and certainty in this area. It would also reduce participants' potential financial exposure.
- A7.64 In terms of disadvantages, the restrictions on the means of payment could mean that some psychic and adult chat TV services will need to adjust their business models, particularly in relation on off-screen activities. This would have little effect on quiz TV services but there could be an impact on chat based services. Data available to Ofcom suggests that in relation to chat services, where broadcasters offer the option of talking to an off-screen operator, between 10-30% of calls may be diverted to those off-screen operators, depending on the type of service and the time of day. Ofcom has noted that not all adult chat TV services seem to offer an off-screen operator option so it would not appear to be essential to a business model.
- A7.65 Given that Option 2 would mean that chat-based services would not be able to divert calls to off-screen operators, this would suggest that in the first instance Option 2 could reduce call volumes in relation to chat-based services by up to 30% and that in turn would have a similar impact on gross revenues (assuming that there is no particular difference in on- and off-screen call durations). Based on the Mediatique report, the gross revenue for adult chat TV and psychic TV was expected to be £20.3m in 2007. A reduction in gross revenues of between 10-30% could therefore equate to reduction an overall reduction of £2-6m across all adult chat TV and psychic TV in absolute terms.
- A7.66 However, Ofcom considers that this estimate relates to revenues in the first instance and the £6m is likely to represent an upper estimate. Ofcom considers that providers of such services may be able to take steps to reduce their cost base or mitigate the loss of call revenue and with that the impact on their profits; for instance, they could increase the degree of interactivity offered within the programme.

⁵⁸ Some psychic chat services offer a credit card payment facility i.e. the viewer calls a freephone number to speak to an operator that then takes their credit card and billing information. The viewer buys a minimum of 20 minutes call time for £30 but can also purchase 10 minute increments up to 60 minutes in any one transaction.

⁵⁹ See Section 10 of the Broadcasting Code. There is also detailed guidance on programme-related material at http://www.ofcom.org.uk/tv/ifi/guidance/guidance10_131206.pdf.

- A7.67 Taking into account the fact that some adult chat TV services do not currently offer access to off-screen operators, Ofcom has made an assumption that other chat based services could mitigate at least half of the loss in gross revenues with the result that the actual final impact on the sector could be less than £3m in lost revenue.
- A7.68 Ofcom notes that the restriction on the use of other means of payment could have a particular impact on psychic TV services in that they appear to include an option to pay by credit card. Ofcom does not believe that adult chat TV services tend to offer this option. It should be pointed out here that Ofcom has concerns regarding whether this practice is consistent with the current requirements of the Broadcasting Code.

Option 3: Continue to classify PTV as editorial but introduce a requirement to carry labelling.

- A7.69 Option 3 would create a new class of editorial content which would be required to carry labelling to make clear its status. Dedicated PTV services would still be allowed to offer on- and off-screen services and a range of payment mechanisms would be permitted.
- A7.70 The benefits of such an approach would be to make the commercial nature of the content clear to viewers – thus avoiding any potential confusion - while at the same time allowing broadcasters to continue to develop the additional funding opportunities that the participatory element allows.
- A7.71 However, one of the disadvantages of this approach is that it would allow a greater degree of commercial activity than is currently permitted without the need for editorial justification in all cases. At the same time the requirement for labelling – which is integral to the option – may not be that attractive from a licensee’s point of view, making it an option for which the balance of benefits and disadvantages is finely balanced.
- A7.72 In terms of the final impact of this proposal, Ofcom would not expect this option to have a significant impact on revenues. There would be little impact on quiz TV services and, for instance, the use of labelling would not prevent the providers of chat-based services from offering off-screen services. Ofcom would therefore expect this option to have a minimal impact on the revenue of broadcasters or indeed PRS providers.

Option 4: Reclassify PTV as advertising i.e. teleshopping or self-promotion

- A7.73 As has been noted, dedicated PTV services promote activities which clearly have a commercial dimension to them and therefore there is the question of whether they should be regulated as advertising. Since these services are inevitably long formats they would have to be one of two types of advertising: teleshopping or self-promotion. Any other advertising formats are, without specific dispensation, heavily confined in the amount of time they can occupy within a television service’s output. With the exception of PSBs, licensees providing an editorial service are permitted to carry up to three hours of teleshopping in addition to their advertising minutage allowances.
- A7.74 Under Option 4, dedicated PTV services would be reclassified as advertising and would fall to be regulated as such i.e. subject to BCAP Advertising Code and

RADA. A full description of the implications of such an approach was set out in Section 6 of the main document.

- A7.75 It could be argued that a benefit of this approach would be enhanced clarity for viewers, especially if basic labelling were to be applied. It would simplify regulation in that there would be a clear division between services that incorporated an element of participation within a framework of clear editorial output (and which would be regulated by Ofcom) and those predicated on viewers paying to participate (i.e. dedicated PTV services) which would be regulated as advertising by the ASA and BCAP. Equally licensees would have a clearer understanding of the regulatory regime.
- A7.76 A cost of this approach would be that adult chat TV would be prohibited from broadcasting free to air and psychic TV would be prohibited from broadcasting altogether, because of specific prohibitions in the BCAP Advertising Code. For channels not exclusively providing dedicated PTV content, for example the public service broadcasters, there could also be an issue in that the advertising minutage rules would severely constrain licensees' ability to provide dedicated PTV content as part of an editorial service.
- A7.77 In terms of the impact of this option, in the extreme, it could result in channels currently offering the chat services closing down altogether. Based on the Mediatique report, this would suggest an impact of £20.3m in 2007.
- A7.78 Whilst adult chat TV might be able to operate in an encrypted form, it is not clear that this would be economic: there would be additional costs in managing subscriber access and there would likely to be significant reduction in call volumes⁶⁰ and with that associated revenue. There would thus appear to be little scope for these services to mitigate the impact of this option.
- A7.79 The impact on general entertainment channels that carry quiz TV segments will be mixed. In most cases, these channels carry less than 3 hours per day of quiz TV programming and so on the face of it the impact on them might be relatively limited – although there is the potential to 'crowd out' existing teleshopping segments. However, given that they tend to simulcast the content of dedicated quiz TV services and that such services could be severely impacted (see below), it could lead to a withdrawal of these strands of quiz TV programming altogether.
- A7.80 For other channels, the impact could be equally significant. The PSB services - ITV1 and five - are not permitted a 3 hour teleshopping allowance in addition to their daily advertising allowance so there would be not only a loss of revenue but also the need to incur costs of additional programming to fill the slots vacated by the quiz TV strands. For other channels (e.g. fiveLife, fiveUS, Life Showcase) there would be the need to reduce the number of hours that they carry quiz TV services down to 3 hours per day as well as arranging additional programming to fill the vacated slots. There could also be an impact in terms of crowding out any existing teleshopping segments. It should be pointed out, however, that the draft AVMS Directive proposes that the current daily limit of 3 hours of teleshopping on editorial channels be removed, but that the hourly restriction on the amount of spot

⁶⁰ Respondents to Ofcom's Issues Paper on PTV in 2006 (available at <http://www.ofcom.org.uk/consult/condocs/participation/>) indicated that the re-organisation of BSkyB's EPG in 2006 and the creation of a specific dedicated Adult and Specialist sections had led to a drop in revenue for their services because on the one hand it was now more difficult for casual viewers to find them and at the same time they faced greater competition from having competing services placed together in close proximity.

advertising (including teleshopping spots) is retained. Member States would be able to impose stricter regulation.

- A7.81 Dedicated quiz TV services could consider reclassifying themselves as teleshopping channels in order to take advantage of this potential relaxation of the regulatory framework although the AVMS Directive will not immediately be transcribed into UK law. There may be disadvantages in terms of positioning on an Electronic Programme Guide, e.g. moving away from an 'entertainment' section to a 'teleshopping' section.

Preliminary Conclusions

- A7.82 The above discussion of the options would tend to suggest that Option 4 has the most significant financial impact across the whole dedicated PTV sector and may not be proportionate in meeting Ofcom's objectives.
- A7.83 Option 2 is likely to impose costs on at least some providers of chat-based services in that it restricts their ability to offer certain off-screen services that they currently provide but broadcasters/service providers would be able to mitigate the impact of this measure. At the same time, there would tend to be off-setting benefits in terms of tying promotional activity much more closely to the editorial content.
- A7.84 Options 1 and 3 are likely to be broadly equivalent in that they should not have a significant effect on revenue. However, Option 1 would not address the objective of securing a clearer separation between advertising activity and editorial content.
- A7.85 At the present time, subject to the outcome of this consultation, Option 2 appears to be the most consistent with the separation principle.