RESPONSE OF CHANNEL 5 BROADCASTING LTD (FIVE) TO THE OFCOM CONSULTATION ON PARTICIPATION TV

Five welcomes the opportunity to respond to Ofcom's consultation paper on the regulation of participation TV, which addresses issues of considerable current importance to Five and to broadcasting as a whole.

Five recognises that the failures and shortcomings of the last few months have had a considerable impact on the perception of the integrity of television. We also know that the issue of viewer participation, in particular involving premium rate telephony, has been at the heart of many of the failings with which we and other broadcasters have had to deal.

We believe all broadcasters need to address and continue addressing how we can maintain and rebuild relationships of trust with our viewers. Five is taking initiatives to this end, including reviewing our own processes, contracts and supplier relationships. This autumn, in a joint venture with Channel 4, we are publishing an Independent Producers' Handbook, a major initiative designed to spell out to our main suppliers their and our respective duties and obligations in producing and broadcasting programmes. We are also contributing to a joint project involving the main public service broadcasters, led by our four chief executives, to examine further ways of restoring trust across the industry.

Five believes it is appropriate for Ofcom as our principal regulator to look at how the rules governing participation in television programmes can be improved. We welcomed the thorough enquiry conducted by Richard Ayre, and support the major thrust of his findings.

Accountability

We agree with the principle that broadcasters must be held directly accountable for what we broadcast. However, as a publisher/broadcaster Five is dependent on independent production companies and other suppliers for the production and full execution of our programmes. Irrespective of how much we strengthen our compliance procedures, there will always be a risk of us being held responsible for actions not our fault.

We believe Ofcom needs to recognise that there may be times when broadcasters are in breach of Ofcom's rules, even though we have taken all reasonable steps to comply with them. Ofcom should also recognise that one way in which broadcasters seek to satisfy their regulatory responsibilities is to enter into comprehensive contractual relationships with our suppliers, and that the effectiveness of these relationships should be considered when investigating any potential rules breach.

Advertising & Editorial

The other major issue addressed in the consultation document is the regulation of programming characterised by Ofcom as "dedicated Participation TV". Five contributed to Ofcom's earlier discussion of such programming[1], and we are pleased Ofcom has developed its thinking in this area. Five continues to believe that there is no separately definable genre of "Participation TV" (or "dedicated participation TV"). We believe Ofcom is right to focus on clarifying the distinction between advertising and editorial, and to that end we support Ofcom's preferred option for enhanced regulation in this area.

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

Five accepts that broadcasters should be responsible for the premium rate services (PRS) included in our programmes. Indeed, the inference of recent Ofcom rulings (into Five's *Brainteaser* programme and GMTV's competitions) is that broadcasters are already fully responsible.

But in practice, publisher/broadcasters such as Five cannot be directly responsible for every aspect of every business procedure that goes to make up every programme we broadcast. Because our business model depends on contracting third parties to make our programmes, there are practical limits on the extent to which we can be responsible for everything they do.

[1] Submission by Channel 5 Broadcasting Ltd (Five) on Ofcom's Issues Paper on the Regulation of 'Participation TV', January 2007

Five fully accepts that we should make every effort to ensure our programmes are compliant with Ofcom's Codes (as well as with the law and other regulatory requirements), and that it is our responsibility to employ robust compliance procedures to every aspect of programme making. We also believe we need to have clear contractual relationships with all partners in the supply chain, so it is entirely clear who is responsible for what.

But we cannot see what purpose is served by making us fully responsible for any mistakes committed by any third party involved in the production process when we have taken all reasonable steps to ensure such mistakes are not made. This is particularly true for the provision of technical services (such as those involved in the delivery of PRS), where we do not have the detailed expertise to oversee every aspect of every procedure.

We believe there are two sets of issues that Ofcom should consider further.

First, Ofcom must recognise that publisher/broadcasters such as Five are dependent on independent production companies and other suppliers for making our programmes. Clearly, it is the responsibility of Five as far as we are able to ensure that programme makers comply with the Ofcom Broadcasting Code and all other procedures. That is why we employ highly skilled and experienced compliance lawyers and programme controllers; and why we engage in educative and information exercises such as the forthcoming Independent Producers' Handbook we have developed jointly with Channel 4. We are also reviewing and enhancing our contractual relationships with our suppliers to ensure they help deliver our regulatory responsibilities.

Despite all these efforts, it is still possible for a production company or other supplier to perpetuate a breach of the Broadcasting Code without Five's knowledge. Yet the effect of Ofcom's proposal could be for us to be judged in breach of the Code through no fault of our own. Ofcom needs to consider how it should act in these circumstances; holding the broadcaster solely responsible is not sufficient if the broadcaster has done everything it could reasonably be expected to do and has not been negligent in its conduct.

Five believes there must be some limitation on the level of responsibility which broadcasters are expected to shoulder. There will be instances that a broadcaster can be reasonably expected neither to be able to foresee nor be held reasonably accountable for; these may include human error, unforeseen system error and deliberate individual dishonesty.

We also believe there should be no impediment on broadcasters recovering some or all of the money paid in a financial sanction from a contracted supplier wholly or partially responsible for a license breach.

Secondly, Ofcom needs to clarify the arrangements between itself and PhonepayPlus (formerly ICSTIS) for the regulation of PRS on TV. Ofcom recognises in its consultation document (paragraph 4.25) that there is a difficulty, but does not indicate how it believes it should be resolved.

Ofcom's proposals raise questions about relations between broadcasters, their contracted suppliers of PRS and the responsibilities of both to Ofcom and PhonepayPlus. In particular, the proposal for broadcasters to be directly responsible for PRS compliance could appear to be at odds with the PhonepayPlus proposal, put forward in its May consultation document, for a prior permission regime for PRS used in TV and radio programmes.

Five wants to be able to rely on service providers for the professional and technical services necessary to deliver PRS on television. For that reason, we support PhonepayPlus' prior permission proposal. Although we had some detailed comments, we supported the principle of a licensing regime that would ensure service providers with which we contracted were properly licensed and obliged to follow certain practices. We believe such a regime should mean that broadcasters would be responsible for taking due care in contracting with service providers and overseeing their interaction with other parts of their business; while service providers would be responsible for delivering the PRS element in programming, and be subject to sanction by PhonepayPlus if they failed to deliver this properly.

Five's response to the PhonepayPlus consultation made clear our belief that a prior permission regime should sit alongside Ofcom regulation of broadcasters. We said "Five wishes to maintain the current regulatory position, in which service providers are answerable to ICSTIS and broadcasters to Ofcom. ICSTIS' proposals for clear contractual arrangements between service providers, broadcasters, production companies and other relevant players will help reinforce the interlocking nature of the relationships between these different parties"[2].

We are concerned to eliminate any element of double jeopardy. We wish to avoid the prospect of a service provider contracted to us being subject to PhonepayPlus regulation for a mistake it has made and then Five being subject to Ofcom sanction for the same error because we are the broadcaster.

Therefore, we believe there should be a prior permission regime for service providers, as proposed by PhonepayPlus, which Ofcom should take account of explicitly in the way it regulates broadcasters. The alternative would be for the relationship between PhonepayPlus and Ofcom to be redrawn radically - an approach we do not support and would expect Ofcom to consult thoroughly on if it wished to pursue.

[2] Response of Channel 5 Broadcasting Ltd (Five) to ICSTIS Consultation on introducing Prior Permission for Premium Rate Services used in Television and Radio Programmes, June 2007

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?

Five recognises that amending licences is a dramatic way of bringing home to broadcasters their responsibilities. However, we are not convinced it is the most appropriate way of giving effect to what Ofcom is trying to achieve. We believe it would be more suitable for Ofcom to amend its Broadcasting Code.

This approach would involve a single amendment to one document. As all broadcasters are obliged to abide by the Broadcasting Code as a condition of their licenses, this would have the same effect as amending the licenses themselves. It would also avoid a vast amount of bureaucracy: to amend each broadcaster's licensees would involve a lot of paperwork and take an inordinate amount of time, as each broadcaster would need to be consulted about, and given the opportunity to make representations about, the proposed changes to each of the licences it holds.

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.

Five believes there is considerable value in third party verification of compliance with PRS requirements. Indeed, when we first discovered the irregularities on *Brainteaser* our first reaction was to suspend all PRS activity and call in external auditors to examine all our broadcasts that involved such activity. We found this audit experience helpful in validating our practice generally and in identifying ways in which certain procedures could be tightened further.

So Five believes there is merit in regular third party audit of PRS activity, as it provides the opportunity for broadcasters to keep their procedures under review and improve them as necessary. We also believe they are more likely to be successful if the auditor is working to a brief designed by the broadcaster than if the form of the audit is dictated externally. Such an approach would be in line with practise more generally: Ofcom sets out the Codes that broadcasters need to follow, but it is up to each individual broadcaster how to ensure it complies with those Codes.

Having completed an audit process, we would have no objection to submitting the report to Ofcom as a matter of course. We also believe it would instil confidence in the operation of PRS services and demonstrate compliance with the new regime if all such external audits were submitted to Ofcom on a regular basis. Therefore, we favour the second option (Option B) of regular verification and regular reporting.

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.

As we argued in reply to Question 2, Five believes an amendment to the Broadcasting Code would be more appropriate than a licence variation. However, if Ofcom is determined to press ahead with licence variations, we would make the following comments.

We believe the variation should reflect the position of broadcasters that contract with third parties. We recognise that the Licensee would "retain responsibility for all arrangements for the management of communication" – in other words have overall responsibility for these services. However we find it odd that while the Licensee would be responsible for ensuring "reasonable skill and care" is exercised in selecting the means of communication etc" (sub-clause 2(a)(i)), there is an absolute requirement to ensure fair and consistent treatment of participation, pricing information and publicity (sub-clauses 2(a)(i) (ii) and (iii)).

We believe it would be more reasonable if the requirement to exercise reasonable skill and care were a more general obligation covering all four elements of clause 2(a). Under this proposal, the clause would now read:

> 2(a) In making arrangements for the management of methods of communication publicised in programmes and intended to allow communication between members of the public and the Licensee, the Licensee must ensure reasonable skill and care is exercised
>
> i) 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) in the conduct of voting, competitions, games or similar schemes 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) in including prominent and comprehensive pricing information in publicity in programmes in a way compatible with any guidance issued from time to time by Ofcom; and

iv) in making certain publicity in programmes for voting, competitions, games or similar schemes is not materially misleading.

This change would place the emphasis on the Licensee to exercise reasonable skill and care – but not to be held responsible if, having done this, a contracted third party let down the Licensee and was responsible for a failing.

Although we have shown the new draft clause in full above, we believe that sub clause 2(a)(iii) is inappropriate as the issue of pricing is already dealt with in the PhonepayPlus Code and its accompanying guidance. Putting this provision in the draft licence variation raises the question of why many other requirements – for example, entry restrictions and closing dates - are not referred to as well.

We assume that Clause 2(b) is a reference to the PhonepayPlus Code of Practice. As all licensees are obliged to abide by the PhonepayPlus Code already (Rule 10.10 of the Broadcasting Code), we assume this makes no material change.

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.

Five has no view on the application of these rules to radio.

Consultation questions:
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.

Five is in favour of greater clarity of regulation, and is conscious of the need better to distinguish between advertising and editorial in order to comply with the requirements of the current and the incoming Directive[3].

[3] Incidentally, it is not true to say "the separation principle remains unchanged" (paragraph 3.16). Article 10 of the Television Without Frontiers Directive says "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". The corresponding wording of the Audio-Visual Media Services Directive reads "Television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme service by optical and/or acoustic and/or spatial means". So the new Directive requires advertising to be kept distinct from editorial but it does not need to be rigidly separated from it.

Five broadcasts late night quiz programme *Quiz Call* three nights a week. Every week hundreds of thousands of viewers watch and enjoy these programmes, whether or not they decide to participate in the quizzes. We spelt out at some length in our response to Ofcom's Issues Paper why these programmes should be classified as editorial.

We pointed out that it is fundamental to advertising and to teleshopping that a product is for sale and that by contacting the vendor it will be possible to purchase that product. Quiz programmes, on the other hand, are based on the principle of entering a competition, taking part in a television programme, having the chance to give a correct answer and winning a prize. Viewers who pay to enter them know they are entering a competition with no guarantee they will be successful.

We also warned that Ofcom was in danger of identifying one characteristic of Quiz TV programmes – the relative centrality of premium rate telephony - as a defining feature that somehow qualifies it as advertising. We suggested Ofcom concentrated instead on the nature of the programme: is it a competition in which viewers are being invited to participate, or is a service being offered for sale?

We also made clear our belief Ofcom was in danger of chasing a chimera by attempting to define 'Participation TV'. Instead, we believed it should look at the central issue it has identified: whether some programmes currently classified as editorial might be better classified as advertising (and vice versa). Once the idea of there being a 'Participation TV' sector is put to one side, we believe it is quite obvious programmes like *Quiz Call* are editorial and should continue to be governed by the Ofcom Broadcasting Code.

It is in light of this approach that we address the four options outlined by Ofcom.

Option 1 – no change. We believe the current position is adequate for regulation of quiz programmes, but recognise that some modification of the Broadcasting Code may be necessary to cater for some of the issues raised by the other types of programme considered as part of this consultation.

Option 2 – classed as editorial, subject to new rules. Like Ofcom, we favour this option. The changes to the Broadcasting Code and the accompanying guidance make clear that PRS can only be used in programmes where the intention is to enable viewers to contribute to the editorial of the programme. This clarifies the distinction between editorial (participating in the programme) and advertising (paying for a service). It is clear viewers make use of PRS during *Quiz Call* to enter the quizzes – their aim is to participate in the editorial of the programme.

Option 3 – classed as editorial, but carrying labelling. Five believes this option would create more problems than it would solve, for several reasons:

- The definition of "dedicated participation programmes" is too open-ended. Notwithstanding the draft guidance, it is clear that talent shows such as *The X Factor* and reality shows such as *Big Brother* are "predicated on viewers' paid participation" – they would not work as formats if viewers did not participate by voting in them. We do not believe that Ofcom has come up with a sufficiently precise legal definition to distinguish the sorts of programming it may wish to capture from other programming that uses PRS.
- The requirement to have a prominent and static on-screen message would add to the amount of information on screen, to the extent that it would make the programme unwatchable by many viewers. The PhonepayPlus Statement of Expectations for Call TV Quiz Services already obliges us to provide a wide range of information on screen, and for purely editorial reasons we would resist any further imposition. It would be ironic that an Ofcom proposal to clarify that a programme was editorial made it look more like an advertisement.
- There is a danger that, far from closing down nefarious practices, this proposal would open up possibilities for several new forms of transactional programming by permitting additional services to be offered as part of a "dedicated participation programme". Some businesses might find it advantageous to abandon teleshopping (or even traditional spot advertising) to promote such programming. The effect of the proposal could be to extend the range of programming marketed as "participation TV", potentially creating new problems.
- There would be a real risk of viewer confusion, as viewers would be presented with what might be perceived as a new form of television that did not fall easily into the accepted and well-understood categories of editorial, advertising and teleshopping.
- By avoiding the question of whether programmes are editorial or advertising, this proposal could lead to further regulatory problems. A new genre of "dedicated participation programmes" would be created by this approach – but the question of whether they are editorial or advertising is dodged. So a main purpose of this part of the consultation would not have been fulfilled.

Option 4 – class dedicated PTV services as advertising. Five is wholly opposed to this option. It would have the effect of closing down our *Quiz Call* programme immediately, as the RADA rules prevent us showing teleshopping unless it counts towards our overall advertising minutage. It is also wrongly conceived, as *Quiz Call* is self-evidently neither advertising nor teleshopping. The option is also vague as to exactly what characteristics of a programme would lead it to be classified as teleshopping – so rather than clarifying where the distinction lies, this option would lead to further obfuscation.

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.

We have the following detailed comments about the revised wording for Option 2:

Rule 10.9

- It is not clear what is meant by "and their equivalents"; there should be a more precise definition that states specifically to what the rule is referring.

Rule 10.10

- The requirement for a viewer to be charged "at the same time as participation takes place and by the same process" is unclear and does not cover all existing practices. For example, people participating in Five's competitions by SMS are charged only when they receive a return message informing them of their participation: this mechanic could fall foul of the new rule.
- It is unclear what "by the same process" means.
- The rule should be clarified to make clear that "participation in a programme" covers both live involvement in a programme and involvement the deadline for which may close several hours or days after a programme has ended.
- The guidance should not include a ban on the use of credit or debit cards; we expand on this point in answer to Question 8.

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.

Five believes the changes to the Broadcasting Code set out in Option 2 should apply to all editorial content. As the purpose of the changes in Option 2 is to better define the distinction between editorial and advertising, it is logical for the new section to apply to all editorial.

However, the effect of doing this would mean the restriction on the use of credit or debit cards in the guidance to Rule 10.10 would apply to all PRS activity, whether it took place in a programme or after a programme had ended. We believe this is too restrictive. For example, some of our week-long competitions already allow the use of credit/debit cards for on-line entry and we do not see why credit and debit cards should be banned in principle.

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.

Five is broadly happy with the Impact Assessment. In particular, we endorse the conclusions reached about Option 4. The only shortcoming we would identify is the lack of any assessment of the increased revenue raising potential of the new regime suggested by Option 3.

Channel 5 Broadcasting Ltd

October 2007