



**The Mobile Broadband Group**

PO Box 34586, London SE15 5YA

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Yvonne Matthews  
Content and Standards  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Dear Yvonne

**Participation TV Part 2: Keeping advertising separate from editorial**

The Mobile Broadband Group (“MBG”, whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to make a further response to Ofcom’s consultations on participation TV.

We are disappointed at the current proposals. It seems that the measures set down by Ofcom will reduce significantly viewers’ access to participation TV shows as well as leading to further damage to the PRS market without any commensurate benefit.

**No evidence of confusion**

The MBG completely agrees with Ofcom that the principle of separating advertising from editorial is very important. This principle exists to protect consumers from being confused or misled by advertising disguised as editorial.

The success of these programmes demonstrates consumers enjoy this format and at no point in this process has Ofcom indicated or provided evidence that customers are in fact being deceived or are confused about the exact nature of the programming they are viewing of programming. Nor is there any allegation of harm arising from the programming being broadcast at unsuitable times for children.

Therefore Ofcom is proposing a regulatory intervention that is not justified by any apparent harm or confusion in the minds of consumers.

As Ofcom concedes, there will be a negative effect on revenues, at a time when the commercial TV companies are seeking new business models to fund programming. This seems to be a perverse outcome and one that is not evaluated given the absence of an impact assessment in the current consultation.

### **Impact assessment**

Given the effect of these proposals and potential impact on PRS, the MBG urges Ofcom to conduct a proper impact assessment and consider other options that would have a less negative impact. The MBG acknowledges that the programming in question may not be to everyone's taste or be of the highest educational value but, considering the post-watershed content that is already provided legitimately free to air, the effect of the rules should not be to act as a censor.

Furthermore, the MBG believes that Ofcom, by working with the assumption that the amount of quiz TV has declined in the last 12 months, may have underestimated the revenue impact of their proposal. The dip could just as easily be temporary and due to the recent publicity surrounding the use of premium rate for entering competitions. The recommendations from Richard Ayre's report have now been implemented and public trust and confidence in premium rate as a charging mechanism should improve.

Proposing measures that would result in the effective outlawing of such programming would therefore appear to be a rather disproportionate response. The BCAP Code relating to these types of services has not been reviewed for a long time and, in any event, the encryption requirement for adult services would not transpose easily to a mobile TV environment. MBG is further concerned over a possible increase in the range of programmes potentially subject to becoming re-classified as advertising at a later date and are therefore very concerned by the potential precedent being set by these proposals.

In the original pre-consultation in December 2006, Ofcom suggested creating a different category of content licence to accommodate adult chat services and similar. The MBG strongly urges that this possibility be re-appraised to see whether a regulatory framework could be put in place that is better targeted at the issue at hand.

### **ECJ Decision and rule 10.11**

Ofcom has interpreted the ECJ judgement concerned with Quiz TV and the opportunity to participate in a prize game in such a way as to widen its effect and justify the extension of scope of Ofcom's proposed regulatory intervention. MBG does not believe this to be necessary to meet Ofcom's statutory duties, and nor has sufficient rationale been provided for such an interpretation of the ECJ decision. The consultation states:

*If it is possible for a quiz show, which invites viewers to call a premium rate number for a chance of answering a question and winning a prize, to represent "a real offer of services", then it follows that other genres of broadcast content predicated on the use and promotion of premium rate services may – depending on the particular facts – also represent a "real offer of services".<sup>1</sup> Ofcom does not really explain why this should be the case.*

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<sup>1</sup> Page 21 of the consultation

Nor do we understand why 'calls being charged at the higher end of the PRS range' be considered a factor that would indicate a breach of rule 10.11. There is no analysis to support the inclusion of this requirement. Furthermore the premium rate regulatory regime is predicated on the basis of pricing transparency and not price limitation. Given Ofcom is moving away from retail price control in a competitive telecoms market, the MBG asks that Ofcom remove this element from the assessment.

### **Targeted regulation**

The new media landscape will no doubt throw up other circumstances that will be similarly challenging to the regulatory framework. The MBG strongly supports Ofcom in trying to maintain a coherent and workable framework. However, we also support the duties placed on Ofcom by the Communications Act to ensure that regulation is targeted and evidence based. The MBG contends that these proposals do not meet these requirements and would ask Ofcom to review its proposals and seek an outcome that has a more proportionate effect on the targeted programming.

Yours sincerely

*Hamish MacLeod*

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Mobile Broadband Group