

Your response

Question	Your response
<p>Question 1: Do you consider Ofcom should approve the PSA's 15th Code of Practice in its current form? Please provide an explanation to support your response.</p>	<p>No – I do not believe that Ofcom should approve the PSA's 15th Code in its current form.</p> <p>There a number of points in the consideration for this answer which should be considered why Ofcom should not be approving the current draft of the 15th Code.</p> <p>Point is that the board whom devised and approve the code are not independent.</p> <p>Under the Communications Act 2003, Section 121, Ofcom have to ensure that the code has been drafted by someone that is "sufficiently independent of the providers of PRS"*. The Ofcom consultation goes on to reference the PSA draft 15th code and in particular section 1.4 which refers to the board at the PSA. The draft 15th code states "No member of the Board may have any current commercial interest in PRS ..."</p> <p>There is currently a member of the PSA board who is directly involved in the PRS industry. They are listed on Companies House as a director of the PSA and also show on the PSA website as a member of the board, along with chairing a panel. This person, who is commonly known within the industry, and states in numerous public places, that they work for a well-known broadcaster, directly in relation to the use of PRS by them. The PSA website itself says "and is responsible for producing relevant interactivity, including voting, competition and donation platforms for charity events, for some of ITV's key programme brands." in their biography.</p> <p>I am therefore lead to believe that the PSA are in breach of their own draft code, by allowing somebody to be a member of the board and director of the company who clearly has a commercial interest in the PRS industry,</p>

therefore resulting in them not being wholly independent when drafting the 15th Code.

It would also be questionable that, although broadcasters are not currently on the list of exemptions, (as published on the PSA website as of 11th June 2021), from registration with the PSA, how one of the main broadcasters currently has an exemption, even though they were found to have breached 2 rules and 3 conditions in relation to their requirements set out by Ofcom in the running of competitions in December 2020 (having previously been issued with the highest ever fine by Ofcom for previous non-compliances in relation to PRS), while the person who is the director of this department remains on the board at the PSA. In the 2020 investigation, nearly 43,000 consumers were affected by this non-compliance, however the PSA only conducted 'initial enquiries' into ITV.

There is strong evidence to suggest that firms who have made much smaller non-compliances including ones that have been self-reported, where the number of consumers at risk of harm, is a fraction or even zero of that in the ITV case, are fully investigated and put on high level investigations, even after providing evidence that steps have been taken to mitigate the risk of the non-compliance happening again, and that all consumers effected had been dealt with satisfactorily. Would this not suggest that there is a bias towards broadcasters and that the PSA take a very light approach to regulation with them when they actually have a very large consumer reach?

There is also a second member of the board who has an interest at the Charity Commission, and I would question their involvement in the code drafting, as their interest could be to ensure that charities can continue to use PRS in an effective way to ensure that they are still able to raise valuable income through this mechanism, with things like the exemptions that are currently in place for this sector of the industry. This would lead to a strong element of prejudice, and anti-competitiveness in sectors of the industry over other sectors.

The current percentage of the market for TV & Radio engagement is around 22%** with the PSA predicting that this will increase by a further 3 percent in the next year. The charity sector accounts for around 6%** of the market. Therefore, there is approximately 30%** of the market, or 21.5million users*, which could be positively affected by the very clear conflict of interest at the board level of the PSA, which makes decisions about how the market can operate, including drafting new regulation over other sectors of the industry.

The PSA clearly state that one of the main reasons for a new code is so that it is in line with the new strategic purpose which the PSA have published. This new purpose would have been devised and agreed by the board, of which two of the members clearly have a benefiting interest in the industry and are therefore not sufficiently independent as per the requirements of the Communications Act 2003.

It is for the reasons stated above that I believe that Ofcom cannot approve the draft 15th code because it does not meet the required standards of the Communications Act 2003 Section 121, (2) (b), stating “that that person is sufficiently independent of the providers of PRS.”

Requirement (2) (f) of the Act states that “that those provisions are proportionate to what they are intended to achieve”. The PSA openly admit that the draft 15th Code is a change away from Outcomes focus regulation, to a more prescriptive code because they felt that outcomes based has not worked.

This however would not be evidenced by the reduction in complaints that the PSA has experienced over the time of the 14th Code. If complaints are down, then why is there a need for a more prescriptive code? Does this not argue that the 15th Code is not proportionate in relation to its intended achievement as complaints and consumer harm are considerably down? The PSA Annual Report for

2019-2020 states “Total complaints down 31% compared to previous financial year”.

The draft 15th code contains extremely onerous requirements within it, which I would anticipate, would bring some form of legal challenge from industry as has been done previously on PSA code 13th edition where the PSA failed in the legal challenge and an amended code, (code 14th) was hastily born. Some examples, (but not all), of these are below

The points 4.4.3 and 4.5.3, both of which are of a similar wording but in relation to two different supervision reports.

4.4.3 states “Audit reporting must commence on the date specified by the PSA in the notice and continue until the relevant PRS provider is notified by the PSA that such reports are no longer required”

4.5.3 makes the same statement but in relation to Periodic reporting.

The fact that both of these requirements have no deadline or end date to them, means that the PSA can require providers to provide onerous information to them, without any reason other than they wish to request the information, for an indefinite period of time. This is one example of the PSA using their powers to gain market information and intelligence through draconian methods.

The PSA have clearly stated that they are taking a supervisory role to regulating and appear to be requiring that they are entitled to all information surrounding the running of the business even if that is not under their regulatory remit. The PSA have previously included in their enquiries that information is disclosed which is not relevant to the compliance issue they are investigating but relates to the general day to day running of the business. Along with forcing industry companies to employ certain people and use certain companies demanding this within the draft 15th code.

	<p>Section 5.1.8 of the draft 15th code states “However, where it is considered appropriate, the PSA may at any time reconsider a case or matter in respect of which it has previously decided not to take further action.” This section of the code is clearly unfair on the providers of PRS and allows the PSA to effectively change their mind at any point in time on a matter.</p> <p>This is not proportionate in what they attend to achieve, but just exercising their powers over those in the market constantly. Proportionate regulation cannot be allowing an investigation to be closed and then reopened again at any time in the future. This is an abuse of powers. With the above examples it clearly shows that the PSA draft 15th code is not fit for purpose and as such cannot be approved by Ofcom under the Communications Act 203.</p> <p>* Communications Act 2003 Section 121 **2019-2020 PSA Annual Market Review published August 2020</p>
<p>Question 2: Do you have any views on the appropriate implementation period?</p>	<p>None</p>