



# Audience Participation in Radio Programming

The Use of Premium Rate Services in Radio:  
Improving Consumer Protection

Statement

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## Section 1

# Summary

## Background

- 1.1 In June 2009 Ofcom published a consultation entitled *Audience Participation in Radio Programming – the use of premium rate services in radio: the options for improving consumer protection* (the ‘June 2009 consultation’).<sup>1</sup> In that consultation we assessed the methods used by radio stations to encourage listener participation in broadcasts, via on-air competitions and phone-in programming. In particular, we examined the means by which listeners responded to calls to action in radio programming, including premium rate telephony services (‘PRS’)<sup>2</sup> such as short message services (‘SMS’).
- 1.2 The use of PRS by broadcasters and competition mismanagement generally has been a matter of significant concern since 2006, when a number of cases of poor practice came to light. An inquiry led by Richard Ayre, a non-executive member of Ofcom’s Content Board (‘the Inquiry’) subsequently concluded that there were systemic problems in broadcasters’ use of PRS. Since that time Ofcom has uncovered more than twenty separate breaches of the Broadcasting Code resulting from competition mismanagement by radio licensees. Fines have been levied against radio licensees on nine occasions.
- 1.3 In an earlier consultation, we examined the use of PRS and competition management generally by television broadcasters.<sup>3</sup> On that occasion, we concluded that the licences of television broadcasters should be varied to make those licensees directly responsible for their communications with the public, where those communications had been solicited in programmes. This meant that television broadcasters assumed responsibility for the management of those communications, whether they were made via telephony, email, post or other means. We also varied the licences of television broadcasters to require them to implement a system of independent third party verification where PRS were used for competitions or voting schemes.<sup>4</sup>
- 1.4 The June 2009 consultation sought views on whether a similar variation to the licences held by radio licensees was necessary and appropriate. We suggested that, given the significant differences between the two broadcasting sectors, both in the

<sup>1</sup> See [http://www.ofcom.org.uk/consult/condocs/audience\\_participation/main.pdf](http://www.ofcom.org.uk/consult/condocs/audience_participation/main.pdf) - The June 2009 consultation.

<sup>2</sup> PRS are defined in section 120(7) of the Communications Act 2003. Under the Communications Act, we have the power to set conditions which regulate the provision, content, promotion and marketing of PRS known as the PRS Condition. When we refer to PRS in the present statement, we mean those services defined as PRS under the PRS Condition currently in force, including premium SMS. For the avoidance of doubt, this includes 087 number ranges – excluding 0870 – which formally became PRS on 1 August 2009. For further information about the scope of the PRS Condition, including its application to some 087 services, see our statement Extending Premium Rate Services Regulation to 087 Numbers at <http://www.ofcom.org.uk/consult/condocs/087prs/087statement/statement.pdf>. Additional information is also available on the PhonepayPlus website at: <http://www.phonepayplus.org.uk/output/087-Number-Range.aspx>.

<sup>3</sup> See *Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial* (known as ‘the July 2007 consultation’) at

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

<sup>4</sup> See <http://www.ofcom.org.uk/consult/condocs/participationtv/statement/ptvstatement.pdf>.

methods and value of their interactions with audiences, a different regulatory solution would be appropriate for radio in order to provide the best balance between consumer protection and the degree of consumer harm, reflecting industry circumstances.

## Conclusion

- 1.5 We have considered the views of respondents to the June 2009 consultation in making our assessment of the appropriate arrangements for regulating audience participation in radio programming. In particular, we note that all of the respondents representing radio licensees supported the regulatory solution advanced by Ofcom in the June 2009 consultation. As with our previous consultation on the use of PRS by television broadcasters, no concerns about our preferred regulatory approach were raised by consumer groups or individuals.
- 1.6 We have concluded that, as proposed in the June 2009 consultation, the licences held by radio licensees should be varied to make licensees directly responsible for communication with the public where the mechanism of communication features in programming. This will mean that radio licensees will assume responsibility for the management of all communications with the public, where these are publicised in programmes.

## Implementation

- 1.7 Under section 87(1) of the Broadcasting Act 1990 (“the 1990 Act”) and section 43(1) of the Broadcasting Act 1996 (“the 1996 Act”) we may for all classes of radio licence issued under each Act set licence conditions including such conditions as appear to us to be appropriate having regard to any duties under the Communications Act 2003 and conditions providing for such incidental and supplementary matters as appear to us to be appropriate. Under section 3(1) of the Communications Act 2003 it is our principal duty to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets where appropriate by promoting competition.
- 1.8 Under section 86(5) of the 1990 Act and section 42(3) of the 1996 Act, we can vary a licence, and therefore include new conditions, provided the licensee has been given a reasonable opportunity to make representations about the proposed variation. This power is also reflected in the licences.
- 1.9 Therefore, in due course we will be notifying holders of the relevant licences formally of the intended licence variation. Licensees will then have four weeks in which to make representations to us.
- 1.10 For the avoidance of doubt, the categories of licences we propose to vary are:
- under the 1990 Act: Local and National Sound Broadcasting Licences, Additional Radio Service Licences, Restricted Service Licences, Radio Licensable Content Service Licences and Community Radio Licences; and
  - under the 1996 Act: Local and National Radio Multiplex Licences, Local, National Digital Sound Programme Service Licences and Digital Additional Service Licences.

- 1.11 After that period, if the variation is confirmed, licensees will be notified of when the variation to their licence will take effect; it is intended that it will then do so immediately.
- 1.12 We will also include the licence condition in future radio licences.

## Section 2

# Background

## Introduction

2.1 In this section we set out the background to the June 2009 consultation, summarising the work we have undertaken since 2007 in relation to the protection of consumers participating in broadcast services, and the issues considered in the current review.

## Inquiry into the use of PRS by broadcasters

2.2 In 2007 issues began to surface that suggested serious failures by broadcasters in the use of PRS on both radio and television had taken place, resulting in harm to listeners and viewers. Investigations conducted subsequently by us and by PhonepayPlus, the body which regulates the content, promotion and overall operation of PRS as defined under the Communications Act,<sup>5</sup> revealed significant compliance failures by television and radio broadcasters, often relating to votes or competition entries which participants had paid to submit.<sup>6</sup>

2.3 An inquiry commissioned by us and led by a member of the Ofcom Content Board, Richard Ayre, examined whether there were systemic reasons behind the compliance failures in television.<sup>7</sup> The Inquiry concluded that television broadcasters did not always understand the nature of their obligation to each viewer who chose to pay a premium in the expectation of receiving an additional service, such as a competition entry. The Inquiry noted that this was a contractual relationship which went deeper than the traditional responsibility of broadcasters to maintain standards as defined in the Broadcasting Code. This was because the contract related to obligations that the broadcaster had to individual viewers rather than to the viewing public as a whole.

2.4 The Inquiry therefore recommended that television broadcasting licences be amended to include a set of consumer protection requirements relating to these individual commercial transactions, in effect making broadcasters directly responsible for PRS compliance throughout the supply chain.<sup>8</sup> It also recommended that broadcasters should be required to undertake an independent audit of their PRS processes and systems.<sup>9</sup>

2.5 Although the Inquiry was concerned with the use of PRS on television, it recommended that, if we chose to consult on proposals to amend the licences of television broadcasters, we should also seek views on the extension of those provisions to radio licensees.<sup>10</sup>

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<sup>5</sup> For further information about PhonepayPlus see the June 2009 consultation, paras. 2.11 – 2.12.

<sup>6</sup> Full details of our investigations under the Broadcasting Code can be found in Broadcast Bulletins at [http://www.ofcom.org.uk/tv/obb/prog\\_cb/](http://www.ofcom.org.uk/tv/obb/prog_cb/).

<sup>7</sup> Although the Inquiry examined the use of PRS in television only, the report stated “it would be surprising, given the range of small-scale PRS-based competitions run on a large number of radio stations, if there had not been further instances of sharp or inadequate practice as yet undiscovered.” The full Inquiry report can be found at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf>.

<sup>8</sup> The Inquiry, para. 1.37.

<sup>9</sup> The Inquiry, para. 1.39.

<sup>10</sup> The Inquiry, para. 1.41.

## Our analysis of consumer participation in television

- 2.6 We consulted on the Inquiry's recommendations between July and October 2007 in *Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial* (known as 'the July 2007 consultation').<sup>11</sup>
- 2.7 We agreed with the Inquiry's conclusion that broadcasters should be directly responsible for PRS compliance throughout the supply chain. Moreover we considered that the problems identified by the Inquiry were broader than the financial harm incurred by viewers or listeners who took part in PRS-based competitions. The failure of broadcasters generally to handle communications from viewers and listeners properly also raised fundamental issues of trust and integrity.
- 2.8 The July 2007 consultation made proposals for a licence variation, closely based on a draft licence variation included in the Inquiry report. The licence variation was intended to set out clearly the compliance responsibilities which broadcasters had: for example, a requirement on broadcasters to ensure that voting and competitions were conducted in such a way as to provide fair and consistent treatment of all eligible votes and competition entries. The July 2007 consultation also proposed that a broadcaster's compliance processes in respect of PRS should include independent third party oversight or verification.
- 2.9 In February 2008, following an analysis of the responses we had received to the July 2007 consultation, we published our statement *Participation TV Part 1: protecting viewers and consumers. Ofcom statement on consumer protection measures for viewers participating in programmes* ('the February 2008 statement').<sup>12</sup>
- 2.10 In the February 2008 statement, we concluded that the measures necessary to provide consumer protection and to promote public confidence in participation techniques – and trust in broadcasting more generally – were so important and so integral to licensees' operational obligations that licence variations were the appropriate instruments to use to implement these measures.
- 2.11 We chose, therefore, to make a variation to television licences, such that
- a) television licensees became responsible for all means of communication with the public where that communication was publicised in programmes; and
  - b) for certain types of communication (i.e. PRS voting and competitions) a mandatory regime of verification was to be introduced.
- 2.12 We also determined that licensees should be responsible for the design of their verification systems and should provide reports to us on request.
- 2.13 In the February 2008 statement, we also noted, that:
- “...because of insufficient data Ofcom did not issue an Impact Assessment for radio with the Consultation. Some respondents to the Consultation argued that Ofcom should not include radio licensees in its consideration of licence amendment. In view of these

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<sup>11</sup> See <http://www.ofcom.org.uk/consult/condocs/participationtv/consultation.pdf> - the July 2007 consultation.

<sup>12</sup> See <http://www.ofcom.org.uk/consult/condocs/participationtv/statement/ptvstatement.pdf> - the February 2008 statement.



facts, Ofcom is not seeking to vary radio broadcasting licences at this time but will be consulting on extending the provisions to radio later...”<sup>13</sup>

## The June 2009 consultation

- 2.14 In the June 2009 consultation we returned to the issue of audience participation in radio, examining the methods used by radio stations to encourage listener participation in broadcasts via on-air competitions and phone-in programming. In particular, we looked at the means, such as PRS, by which listeners responded to calls-to-action in radio programming and the revenue that these methods generated.
- 2.15 We took account of a number of key factors in our analysis. Firstly, having collected the relevant information from licensees, we noted that, unlike in television at the time of the June 2007 consultation, PRS revenue across the sector was small and declining both as a proportion of radio licensee revenues and in absolute terms.
- 2.16 Further, although there was relatively little evidence of financial harm to listeners, the number of breaches of the Broadcasting Code recorded by us over the last two years suggested a continuing issue regarding competition compliance in radio. In 2007 we published details of three separate cases featuring breaches of the Broadcasting Code by radio licensees, while a further two cases were resolved without a formal breach recorded.<sup>14</sup> In 2008, ten breach cases and one resolved case were published, while a further eight breach cases were deemed sufficiently serious to warrant a financial penalty. Thus far in 2009, one breach case has been published, which also led to a financial penalty. On five other occasions (including three times in 2009) we have found radio licensees in breach for issuing calls-to-action in pre-recorded programming broadcast ‘as live’.
- 2.17 Finally, we noted that the RadioCentre, the trade body for UK commercial radio, had produced a *Code of Practice on Premium Rate Interaction* (the ‘Code of Practice’) for its members.<sup>15</sup> The Code of Practice provided guidance for radio licensees on the use of PRS, including details of the various relationships involved in providing such services. It also identified technical specifications for the management of PRS and included requirements for the authorisation of PRS mechanics by senior management, clarity of pricing information and transparent complaints. Whilst compliance with the Code of Practice was a requirement for membership of the RadioCentre, we noted that it did not provide for enforcement by an independent self-regulatory body.
- 2.18 In light of our analysis we put forward three potential options for the regulation of audience participation on radio:
- a) Option 1: the status quo option under which we would make no changes to the regulatory obligation on radio licensees. Instead we would look to assess the

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<sup>13</sup> See the February 2008 statement, para. 1.13.

<sup>14</sup> Our *Guidelines for the handling of standards complaints and cases (in programmes and sponsorship)* defines resolved cases as complaints which are “satisfactorily ‘resolved’ without the necessity for formal intervention... Such circumstances are limited but might exist where a broadcaster has taken immediate and appropriate action and remedied the problem. A ‘complaint resolved/no further action is necessary’ finding is at Ofcom’s discretion.” See <http://www.ofcom.org.uk/tv/ifi/guidance/standards/>.

<sup>15</sup> A full copy of the Code of Practice was attached as annex 3 to the June 2009 consultation.

efficacy of the Radio Centre's Code of Practice over a twelve month period before considering whether further measures were necessary.

- b) Option 2: as with option 1, we would assess the efficacy of the RadioCentre's Code of Practice over a twelve month period. We would also introduce a variation to radio licences (the "Variation"), to make clear that radio licensees were responsible for all aspects of their communications with the public where these are publicised in programmes.
- c) Option 3: as option 2, however under this option we would also extend to radio licensees the regulatory requirements placed on television licensees following the February 2008 statement. In addition to the Variation, therefore, we would introduce a mandatory regime of verification by an independent third party for PRS-based voting and competitions.

2.19 In the June 2009 consultation we indicated our preliminary view was that, although radio licensees made less use of PRS than television licensees, there was evidence to suggest that listeners had suffered as a result of poor compliance practices due to competition mismanagement generally. We considered that option 2 provided the best balance of consumer protection and industry interests.

## Section 3

# Consultation Responses

## Introduction

- 3.1 In the June 2009 consultation document, we outlined three possible options for regulation of listener participation in radio programming. Following an assessment of those options, we also stated our view that option 2, requiring a licence variation to make clear that radio licensees were responsible for all aspects of their broadcast communications with the public, was likely to provide the best balance of consumer protection and industry interests. We then invited interested parties to comment on our proposal.
- 3.2 In this section, we set out the responses we received from consultees, offering our view on the arguments presented and the conclusions that we have reached.

## Summary of Responses

- 3.3 We received six responses in total to the June 2009 consultation. One respondent requested that its response be kept confidential. Non-confidential responses were received from the Association for Interactive Media and Entertainment ('AIME'),<sup>16</sup> Bauer Consumer Media Ltd ('Bauer'), Global Radio UK Ltd ('Global'), the RadioCentre and Spark FM, a community radio station based in Sunderland.

## Responses to Question 1

- 3.4 We asked whether consultees agreed with our view that radio licensees should be directly responsible for all forms of listener interaction, including PRS in programming.
- 3.5 Four respondents – Bauer, Global, the RadioCentre and Spark FM – supported our preferred approach under option 2.
- 3.6 The RadioCentre stated that it agreed with the principle that “as licensees, broadcasters should be responsible for all aspects of their output, including its origination and production.” It considered that option 2 would provide clarity, placing “the focus of regulatory action unequivocally on the broadcaster”, and noted that it had already incorporated compliance with our proposed licence variation in its *Code of Conduct for Premium Rate Interaction*.
- 3.7 Nevertheless, the RadioCentre challenged the finding of the Inquiry, cited in the June 2009 consultation, that making licensees “directly responsible for PRS compliance right through the supply chain ... [was] the only method ... to give broadcasters the incentive to exercise due diligence in the design, commissioning, delivery and auditing of PRS-programming.”<sup>17</sup> The RadioCentre was concerned that implementation of option 2 should not mean that broadcasters would be held responsible for failures by third party PRS suppliers which they could not reasonably be expected to be aware of, for example, where information was deliberately withheld

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<sup>16</sup> AIME, whose membership includes the BBC, ITV and several companies who provide PRS management services to radio licensees, is a trade association representing businesses involved in all aspects of interactive media and entertainment, including PRS.

<sup>17</sup> See the June 2009 consultation, para. 3.4.

from broadcasters. It noted that all parties “in the PRS value chain [were] regulated by Ofcom – either directly or by delegated powers to PhonepayPlus” and it was believed that holding licensees responsible in all cases for the failures of suppliers could actually lead some of those to show less vigilance in compliance.

- 3.8 This concern was echoed by Global, which noted that “certain areas of [the] ‘process chain’”, such as network operator systems, were outside the scope of licensee management. Global considered that it would be “unproductive and contrary to Ofcom’s principle of ‘light-touch regulation’” were we to make radio licensees “responsible for the failings of a process over which [broadcasters] have no control.”
- 3.9 In contrast to the responses noted above, AIME argued that while option 2 did “not appear to have serious cost implications”, its introduction could “as was demonstrated by the TV experience, impact strategic thinking regarding possible loss of licence and introduce uncertainty regarding liability” with a possible impact on programme development. AIME, which considered that our estimate of revenue from PRS<sup>18</sup> was “considerably overstated”, believed that the “unforeseen and unintended consequences” of such action “would need to be explored in a comprehensive Impact Assessment”.
- 3.10 AIME considered instead that option 1 was preferable. AIME stated that it was “not aware of any significant consumer complaints or harm, either in radio or TV, currently affecting [the PRS] service sector” and believed that the “radio community [had] learned from the experiences of their TV counterparts to the extent that current examples of consumer harm for participative radio programmes are now very few indeed”. As a result, while it agreed that licensees “should be made responsible for ensuring [they had] satisfactory arrangements for the management of communication”, it considered that, in light of the RadioCentre’s new Code, “it should be sufficient to strengthen the application of existing rules using the current regulatory structure” rather than requiring the introduction of further statutory obligations.

## Ofcom’s view

- 3.11 We note that the majority of respondents, including all of those representing radio licensees, agreed that radio licensees should be directly responsible for all forms of listener interaction.
- 3.12 In response to the concerns raised about the extent of that responsibility, it remains our view that it is reasonable to expect that a licensee which solicits calls or texts from listeners is held accountable for the proper management of the systems used to manage those communications, particularly if it makes money from doing so. Irrespective of whether (for the sake of convenience or lack of expertise) it enters into a contract with a third party supplier, we do not see how it is appropriate for a licensee to seek to delegate compliance responsibility for its interactions with listeners to another company. Nevertheless, it is the case that in assessing the seriousness of any breach of the new licence condition and the suitability of a case for statutory sanction, we would of course examine the specific circumstances in which the breach arose.
- 3.13 We also do not accept that the introduction of the Variation is likely either to have significant unknown consequences or to lead radio stations to abandon PRS because of the additional compliance duties that they will be expected to carry out.

<sup>18</sup> See the June 2009 consultation, para. 3.22.

As we explained in the June 2009 consultation<sup>19</sup>, it is our view on the basis of the evidence we received from licensees about their current use of listener interaction techniques and the revenue generated by them, that making licensees formally responsible for compliance through the imposition of clear licence obligations should not impose any significant incremental costs on those licensees. We remain of the view that the Variation should serve solely to provide clarity as to where responsibility for communication with listeners ultimately lies.

- 3.14 Further, we reject the suggestion that competition mismanagement has had only a negligible impact on radio listeners in the UK. As noted in section 2 above, radio licensees have been fined on nine separate occasions over the past two years for serious breaches of the Broadcasting Code relating to competitions, while in a further fourteen cases we have found licensees' conduct in competitions to have breached the Broadcasting Code. Although the financial harm has been small in many of these cases, as we have made clear since the July 2007 consultation, the effect of competition mismanagement relates not only to the financial harm suffered by members of the public, but also to more fundamental issues of trust and integrity in broadcasting.

## Responses to Question 2

- 3.15 In light of our preferred option, we asked whether consultees were content with the Variation set out in Annex 2 to the June 2009 consultation.
- 3.16 Two respondents – Bauer and Spark FM – were content with the Variation included in the June 2009 consultation.
- 3.17 The RadioCentre was generally supportive of the wording in the Variation. It reiterated its concern, however, that in certain circumstances radio stations would not be able to prevent consumer harm, for example in the event of a major system failure by a service provider. It noted the Variation required “reasonable skill and care [to be] exercised by [Licensees]” but requested further clarification from us as to how the Variation would be applied.
- 3.18 Global raised broadly similar concerns to those of the RadioCentre. Although it had no objection in principle in being responsible for the management of listener communication, it felt that this should be limited to exclude technical issues experienced by third parties. Global proposed the following amendment to the Variation to clarify this point:

“The Licensee shall be responsible 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, and where the Licensee can reasonably be expected to have control over the management of such communication.”<sup>20</sup>

- 3.19 Global considered that the sections of the Variation which specified that the conduct and publicity of competitions and other similar activities should be both ‘fair and consistent’ and ‘not materially misleading’ were unsuitable. It noted that amendments

<sup>19</sup> See the June 2009 consultation, para. 4.26.

<sup>20</sup> Global’s proposed amendment to the text of the draft licence variation is underlined.

to the Broadcasting Code proposed by Ofcom<sup>21</sup> introduced similar obligations to those specified in the Variation. Global was concerned that duplicate provisions in the Broadcasting Code and in radio licences could create ‘double jeopardy’ for licensees and argued that the relevant sub-sections should be removed from the draft licence provisions.

- 3.20 In line with its preference for option 1, AIME believed that a licence variation was unnecessary. It considered that all issues pertaining to the compliant operation of PRS were covered in the PhonepayPlus Code. It reiterated its concern that the introduction of the Variation “could well have unforeseen and unintended consequences that could adversely impact the participative radio market and this would need to be explored in a comprehensive Impact Assessment.”

### Ofcom’s view

- 3.21 Although we note the concerns expressed by some respondents about the wording of the Variation, we do not consider that the amendments they have proposed are appropriate. By seeking to clarify the scope of licensee responsibility, in our view the proposed amendments serve instead to obfuscate the issue and limit the accountability of licensees, discouraging them from holding suppliers to account for their processes in order to limit their potential for liability. As we have previously explained,<sup>22</sup> we consider that varying licences serves to send the strongest possible message to licensees of their direct responsibilities while permitting a wide range of regulatory responses that can be suited to the circumstances of any particular breach. As we have made clear above, in assessing the seriousness of any breach of the new licence condition and the suitability of a case for statutory sanction, we would of course examine the specific circumstances in which the breach arose.
- 3.22 We also consider that Global’s suggestion of double jeopardy is based on a misunderstanding of the different roles played by the Broadcasting Code and the Variation. The Broadcasting Code is ultimately designed to meet Ofcom’s duty in the Act to set “standards for the content of programmes to be included in television and radio services”, that is, to ensure that the material which appears on air does not cause harm. The Variation imposes a different kind of obligation, relating to the manner in which the radio service operates the management of communication, such as the processes by which it handles calls from listeners.
- 3.23 Finally, we do not accept that the Variation would lead to ambiguity regarding the respective roles of Ofcom and PhonepayPlus. Service providers would continue to be regulated by PhonepayPlus, while Ofcom would remain the lead regulator in the management of listener communication through the licence.

### Responses to Question 3

- 3.24 We asked, notwithstanding our preference for option 2, whether consultees considered that independent third party verification for PRS was necessary, and if so, whether the model outlined in the June 2009 consultation was appropriate.
- 3.25 None of the four respondents that addressed this question – AIME, Bauer, Global and the RadioCentre – were in favour of the introduction of third party verification.

<sup>21</sup> See *Broadcasting Code Review: Proposals on revising the Broadcasting Code* at <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>.

<sup>22</sup> See the February 2008 statement, para. 5.11f.

- 3.26 Bauer argued that independent third party verification would put PRS activity beyond the reach of commercial radio services. This view was supported by Global, the RadioCentre and AIME.
- 3.27 Global also noted the smaller scale of the radio industry as compared to television. It argued that, because “the overwhelming majority” of programming on commercial radio is produced internally, radio licensees had “much tighter control” over methods of listener participation than television licensees would do. As a result it considered that the Variation was both adequate and proportionate.
- 3.28 The RadioCentre considered that third party verification would impose “an excessive regulatory burden out of proportion to the potential harm that could result from non-compliance”. It stated that the use of PRS on radio generally sought to offset some of the costs of production, rather than to maximise profit. It was concerned that the basic cost of third party verification would be greater for radio than for television, given that many contests involving PRS on radio were run across multiple local radio stations. The upshot of third party verification would be, in its view, to eliminate PRS activity from commercial radio: “this would, we believe, be to the listeners’ detriment as it would make less funding available for the interactive features that our audiences enjoy.”
- 3.29 AIME agreed with the other respondents that the costs of third party verification would be “prohibitive and disproportionate”, impacting on the development and diversity of radio programming. It considered that the codes operated by the RadioCentre and PhonepayPlus were sufficient to ensure high compliance standards and argued that there was a “general awareness” among broadcasters that content using PRS should be “operated compliantly and transparently as well as being seen to be fair”.

## Ofcom’s view

- 3.30 As discussed in the June 2009 consultation<sup>23</sup>, although independent third party verification would provide strong protection for members of the public from harmful material in programming, in light of evidence suggesting that PRS use on radio was rarely better than revenue neutral and that the cost of third party verification could undermine the ability of commercial radio licensees to invest in innovative programming, it was our initial view that third party verification was not appropriate at this time.
- 3.31 We note that all of the respondents who addressed this question concurred with our view that independent third party verification would put PRS activity beyond the reach of commercial radio services. In light of both our initial analysis and the views of respondents, we do not consider that third party verification in radio is currently necessary.

## Our conclusions

- 3.32 We have carefully considered the views of consultation respondents in making our assessment of the appropriate arrangements for regulating audience participation in radio programming. In particular, we note that all of the respondents representing radio licensees supported the regulatory solution preferred by Ofcom.

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<sup>23</sup> See the June 2009 consultation, paras. 4.30 - 4.35.

- 3.33 We have concluded that the licences held by radio licensees should be varied to make licensees directly responsible for communication with the public where the mechanism of communication features in programming. This will mean that radio licensees will assume responsibility for the management of all communications with the public, where these are publicised in programmes. This general responsibility will apply to any means of communication. It will cover all forms of telephony, email and other internet-based communication, post and so on.
- 3.34 In the next section we explain how we intend to implement this change to radio licences.



## Section 4

# Implementing the Licence Variation

## Introduction

- 4.1 In this section we set out the new obligations that we will place on radio licensees, and how they will be implemented.

## The licence variation

- 4.2 The new licence condition will take the same form as the Variation included as annex 2 of the June 2009 consultation, namely:

1 The Licensee shall be responsible 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, in particular, 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;
- 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
- iii) 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.

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.

## The effect of the licence changes

- 4.3 The Variation will make radio licensees responsible for all communication with the public that is publicised in programmes. This means that the management of any form of communication – including telephony (on whatever platform or tariff), post, email, internet connection and so on – used by a licensee for communication with or from listeners will become unambiguously the responsibility of the licence holder. (For the avoidance of doubt, these new conditions do not apply to any communication publicised in advertising.)
- 4.4 The principal aim of the Variation is to ensure that where licensees solicit communications from audiences as part of the editorial content of a programme, listeners can be reassured that their calls, emails etc are treated properly. The most high-profile applications of these techniques are competitions. It should be stressed, however, that all applications of listener communication publicised in programmes are intended to be captured by the general responsibility created by the Variation.
- 4.5 Therefore the operation effect of this part of the Variation is that appropriate compliance arrangements are in place for the management of all listeners' communications encouraged through programme publicity.

## Enforcement and interpretation

- 4.6 Breaches of licences, including breaches of the Broadcasting Code, carry a range of statutory sanctions. For example, we can impose a financial penalty on a licensee, suspend or shorten a licence period or revoke a licence. A full discussion of our sanctions procedures in relation to content only can be found in the document *Outline procedures for statutory sanctions in content and content-related cases*.<sup>24</sup>
- 4.7 When considering breaches of licence conditions including the Broadcasting Code, we will exercise our discretion over the seriousness of breaches and give due weight to all mitigating factors. We will take into account the particular facts of each case and the extent of unforeseeable problems.

## The BBC

- 4.8 Although we consider it is important that similar compliance obligations should apply across the whole UK radio industry, we are aware that variations to radio licences exclude the BBC. The BBC Trust is responsible for considering compliance arrangements for the BBC in this area. We note that the BBC revised its compliance processes relating to competitions and voting across all platforms in 2008, including those relating to the selection and verification of service providers.

## PhonepayPlus

- 4.9 In May 2007, PhonepayPlus issued a consultation on a prior permission regime for premium rate service providers who entered into contracts with broadcasters. In its subsequent statement, *Regulation of PRS used in Television Broadcasting*,<sup>25</sup> PhonepayPlus determined that a prior permission scheme was appropriate for service providers entering into contracts with television broadcasters. In light of its

<sup>24</sup> See <http://www.ofcom.org.uk/radio/ifi/ifi-guidance/sanctions/annexsanctions.pdf>.

<sup>25</sup> See [http://www.phonepayplus.org.uk/upload/Statement\\_on\\_Participation\\_TV.pdf](http://www.phonepayplus.org.uk/upload/Statement_on_Participation_TV.pdf).

consultation responses and our decision to consult separately on audience participation in radio broadcasting, it elected to exclude radio from the scheme.

- 4.10 PhonepayPlus have advised us that, at this time, they see no evidence to suggest that they should extend their prior permission arrangement to service providers contracting with radio broadcasters. PhonepayPlus will keep this decision under review and consult with interested parties should they see the need to alter the regulatory arrangements for PRS when provided on radio.

## Implementation

- 4.11 Under section 87(1) of the Broadcasting Act 1990 (“the 1990 Act”) and section 43(1) of the Broadcasting Act 1996 (“the 1996 Act”) we may for all classes of radio licence issued under each Act set licence conditions including such conditions as appear to us to be appropriate having regard to any duties under the Communications Act 2003 and conditions providing for such incidental and supplementary matters as appear to us to be appropriate. Under section 3(1) of the Communications Act 2003 it is our principal duty to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets where appropriate by promoting competition.
- 4.12 Under section 86(5) of the 1990 Act and section 42(3) of the 1996 Act, we can vary a licence, and therefore include new conditions, provided the licensee has been given a reasonable opportunity to make representations about the proposed variation. This power is also reflected in the licences.
- 4.13 Therefore, in due course we will be notifying holders of the relevant licences formally of the intended licence variation. Licensees will then have four weeks in which to make representations to us.
- 4.14 For the avoidance of doubt, the categories of licences we propose to vary are:
- under the 1990 Act: Local and National Sound Broadcasting Licences, Additional Radio Service Licences, Restricted Service Licences, Radio Licensable Content Service Licences and Community Radio Licences; and
  - under the 1996 Act: Local and National Radio Multiplex Licences, Local, National Digital Sound Programme Service Licences and Digital Additional Service Licences.
- 4.15 After that period, if the variation is confirmed, licensees will be notified of when the variation to their licence will take effect; it is intended that it will then do so immediately.
- 4.16 We will also include the licence condition in future radio licences.

## Annex 1

# Licence Variation

- 1 The Licensee shall be responsible 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, in particular, 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;
  - 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
  - iii) 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.
- 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.