

## Participation TV Part 2: Keeping Advertising Separate From Editorial

### Five's response to Ofcom's consultation on new Broadcasting Code rules for the use and promotion of premium rate services in programmes

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#### Introduction

1. In its response to Ofcom's first consultation on Participation TV in 2007, Five agreed with Ofcom's preferred option for the regulation of participation TV predicated on the use and promotion of premium rate services ("PRS") ("dedicated PTV"), namely, Option 2, which involved new rules for the Broadcasting Code that in effect would require all phonecalls to clearly contribute to on-screen editorial content. Ofcom acknowledged that it was arguable that quiz TV entries should be considered as direct contributions to editorial content.
2. Following the European Court of Justice's ruling on 18 October 1997,<sup>1</sup> Five recognised that definitional rules should be applied to PRS-based output in order to establish its regulatory position under the broadcasting law and codes. As Ofcom acknowledges, the proposed rules go further than the draft rules suggested as part of Option 2 as set out in the 2007 Consultation.
3. In particular, the proposed rules, if adopted, would have the effect of re-classifying Five's dedicated PTV programme, *Quiz Call*, as teleshopping. Under the current Ofcom rules on the amount and distribution of advertising we would no longer be able to broadcast the programme in its present form on Five.

#### ECJ Judgement

4. As Ofcom has acknowledged in this Consultation, the ECJ judgment said that, notwithstanding the categorisation of the game at issue in the case before it as teleshopping, there was still a need for an investigation as to whether, in view of its particular characteristics, that broadcast or part of the broadcast constituted a real offer of services. The ECJ said an assessment must be carried out of all the factual circumstances of the case.
5. The ECJ said the following must be taken into account in the context of that assessment:
  - a. the purpose of the broadcast of which the game forms part;
  - b. the significance of the game within the broadcast as a whole in terms of time;
  - c. the significance of the game within the broadcast as a whole in terms of anticipated economic effects in relation to the economic benefits which are expected in respect of that broadcast;
  - d. the type of questions which the candidates are asked.
6. The Court also said that a game can only constitute teleshopping "if that game constituted an actual economic activity in its own right involving the supply of services and was not restricted to a mere offer of entertainment within the broadcast".

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<sup>1</sup> Judgement of the Court, 18 October 2007, in Case C-195/06, reference for a preliminary ruling under Article 234 EC from the Bundeskommunikationssenat (Austria), made by decision of 4 April 2006, received at the Court on 27 April 2006, in the proceedings *Kommunikationsbehörde Austria (KommAustria), v Österreichischer Rundfunk (ORF)*

7. It pointed out that the television broadcaster may simply have had the intention of making that broadcast interactive without thereby making an actual offer of services in the gambling sector, particularly if that game represented only a minimal part of the content and time of the entertainment broadcast and, therefore, did not change the nature of that broadcast, particularly if the questions which the candidates were asked were unconnected with the promotion of goods or of services in connection with a trade, business, craft or profession.
8. The Court said the same would be true if the economic interest expected from that game proved to be quite incidental in relation to that of the broadcast as a whole.
9. These considerations were central to the reasoning of the ECJ and of its decision in the case, and therefore must be central to Ofcom's thinking in how to apply the proposed rules going forward to ensure they are proportionate and lawful.

#### **Ofcom's interpretation of the judgment**

10. Ofcom has rightly identified the four criteria set out by the ECJ as being relevant to the assessment of whether broadcast content comprises "a real offer of services".
11. However, Five does not accept Ofcom's interpretation of the final criteria, the type of questions which the candidates are asked, as being narrow, specific only to quiz TV. The ECJ lists this criteria alongside the other three in its own summing up:

"...a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked."<sup>2</sup>

12. The type of questions which are being asked are clearly relevant to the assessment of whether the opportunity to participate in the programme comprises a real offer of services and is of equal relevance to determining whether the broadcaster's intention is, in fact, merely to make the broadcast interactive in the same manner that a magazine publisher may insert a prize game in a publication. A question that did not in any way promote any other goods or services would, in Five's submission, tend to indicate that the broadcast would not be covered by the definition of teleshopping.
13. Therefore, this criteria must be given equal weight in any assessment of whether a programme which includes any form of viewer competition should be classified as teleshopping and/or is compliant with the new rules on the use of PRS in programming.

#### **Proposed amendments to Section 10 of the Broadcasting Code**

14. We turn now to respond to the specific consultation questions .

*Q1. Do you have any comments on the drafting of the proposed amendments to the Broadcasting Code set out in Section 4? Please provide drafting suggestions where appropriate.*

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<sup>2</sup> Para 47, *ibid.*

15. Meaning of "programme-related material". The amendments to the definition of "programme-related material" could be interpreted as having the effect of removing all methods of communication between the broadcaster and viewer from the definition of programme-related material. This has the potential to cause uncertainty in the area of the promotion of programme-related websites which are designed specifically to enable a viewer to interact with a programme. We do not believe this to be Ofcom's intention, but believe the phrase "to benefit fully from that programme" is capable of bearing a sufficiently wide meaning to encompass the promotion of programme-related websites which seek to offer viewers a wider interactive experience than is possible in a linear television environment. We would appreciate clarification on this point.
16. 10.9. We believe Ofcom should reconsider its position in relation to charging mechanisms for programme participation or interaction. We do not accept Ofcom's argument that participation by means of another payment method would "give the clear impression that audiences were buying a service of some kind". Once it is accepted that broadcasters may charge viewers to participate in or interact with programmes the method of charging appears, in our view, to be irrelevant, provided the other considerations that tend to suggest compliance with Rule 10.11 suggested in Ofcom's draft guidance on that Rule are met.
17. Some viewers may, for example, have decided to bar calls to premium rate numbers from their telephone to prevent unauthorised or high volume calls to these numbers. It should not be forgotten that the use of PRS is not confined to participation in television programmes. Ofcom's suggestion that paid-for participation in programmes may only be charged using PRS will unfairly prevent those who have barred calls to PRS from their service from participating.
18. There are other reasons why viewers may not wish to pay for their participation using PRS; they may for personal or professional reasons wish to exclude the making of PRS calls from their telephone account. Alternatively, their network operator may charge significantly more for the call to the PRS than other operators, and the viewer may be unwilling to pay this additional charge.
19. We see no reason why viewers should not be able to exercise a choice as to how they pay for their participation in a competition, vote, or other interaction with a programme, and do not believe payment using a credit or debit card, or online payment service such as PayPal or Google Checkout, is a relevant criteria in establishing the intention behind the promotion of a competition, or necessary for consumer protection.
20. 10.11: "...broadcasters must ensure that the service enables viewers or listeners to participate directly in or contribute directly to the editorial content of the programme". We do not believe that the drafting of this rule provides sufficient scope for the inclusion of competitions in programmes. A magazine programme, for example, may include a competition as one of many items within it. Neither the competition question, nor the prize, may have any direct relation to other editorial content in the programme; for example a stand-alone competition offering a cash prize. The winner of the competition may not be announced on that or any future edition of the programme (the outcome of the competition could be announced on a website related to the programme which is the usual method where programmes are pre-recorded).
21. However, the draft guidance to Rule 10.11 states that entry to a competition is contemplated as being part of "editorial content" – thus calling into question whether a stand-alone competition could be classified itself as "editorial content". The draft rule may also create tension between rules 10.3 (no promotion of products and services) and 10.4 (no undue prominence). The rule could be interpreted as meaning

competitions must be based on editorial content elsewhere in the programme, either by ensuring the competition question referred to editorial content contained elsewhere in the programme, or by offering something featured in the programme as a prize.

22. Each of those interpretations would carry a risk. Basing a competition on the programme's editorial content may conflict with the ECJ's fourth criteria for the assessment of whether a broadcast could be classed as teleshopping, namely whether the type of question asked indirectly promotes the merits of the broadcaster's programmes. Equally, if prizes to be won were the subject of representations or promotions extolling the benefits or virtues of that prize (as may be the case in a favourable consumer review of a product) the rules on undue prominence may be problematic. For example, Five's *The Gadget Show* often gives away competition prizes which have featured elsewhere in the programme.
23. We believe the guidance should therefore make clear that competition questions which are based on *the* editorial content of *that programme* would tend to indicate compliance with rule 10.11. In addition, we believe the rule should be re-drafted in the following form:
  - ...broadcasters must ensure that:
    - the service enables viewers or listeners to participate directly in or contribute directly to the editorial content of the programme (which may include a competition).
24. 10.11: "...broadcasters must ensure that the service is not given undue prominence within the programme  
We find use of the phrase "undue prominence" to be extremely unhelpful in this context and likely to cause great confusion. Undue prominence as a general television industry concept is widely understood as referring to products and services. Ofcom guidance on undue prominence refers to "branded products and services". The acceptance of the use of premium rate services in programmes carries an inherent recognition that they are not products or services, promotion of which is prohibited under Rule 10.3 of the Broadcasting Code.
25. We therefore suggest the deletion of the third bullet point from this draft rule in its entirety. The draft bullet point which follows it ("the programme consists primarily of content other than the promotion and use of the service") provides a clear and sufficient framework to ensure the programme does not fall within the definition of teleshopping. The draft considerations that would tend to suggest compliance with rule 10.11 in the draft guidance to rule 10.11 add further clarification on the acceptability or otherwise of the promotion of PRS in programmes.
26. 10.11: "...broadcasters must ensure that the primary purpose of the programme is editorial, and any commercial activity associated with the service (including but not limited to the generation of call revenues) is secondary to that purpose.
27. All programmes have several "purposes"; they may be designed to entertain, inform, or educate viewers, they may fulfil some of a PSB channel's public service obligations, they may aim to attract large audiences and so attract advertisers, they may simply fill a hole in the schedule. It is not always easy to say what a programme's primary "purpose" is and it could be argued that the primary purpose of all commercial broadcasters' programmes is to raise revenue in one way or another.
28. The ECJ noted the following in its judgment:

"...it is not inconceivable that the television broadcaster simply had the intention, taking into account the purpose of the broadcast of which the game forms part, of making that broadcast interactive without thereby making an actual offer of services in the gambling sector, particularly if that game represents only a minimal part of the content and the time of the entertainment broadcast and, therefore, does not change the nature of that broadcast, and if the questions which the candidates are asked are unconnected with the promotion of goods or of services in connection with a trade, business, craft or profession. The same is true if the economic interest expected from that game proves to be quite incidental in relation to that of the broadcast as a whole."<sup>3</sup>

29. It is clear from this that the broadcaster's intention is important in establishing the "primary purpose" of the programme. We therefore propose that the word "broadcaster's" be inserted before "primary purpose" to clarify this point.

### **Proposed guidance to be added to existing guidance on Section 10**

*Q2. Do you have any comments on the draft explanatory guidance set out in Section 4? Please provide drafting suggestions where appropriate.*

30. The draft guidance suggests that 'programme' content could be in breach of the Broadcasting Code and be required to meet the requirements of the relevant advertising content and scheduling codes for that medium at the same time. This cannot be the case; content is either advertising, broadcast under a broadcaster's allowance for advertising minutage, or editorial content and must meet the requirements of the relevant Code. Content cannot be in breach of the Broadcasting Code and also potentially in breach of the relevant advertising content and scheduling codes.
31. It will be for the broadcaster to decide whether its 'programme' content seeks to comply with the Broadcasting Code or the relevant advertising content and scheduling codes and any content which does not comply will be in breach of either one or the other; never both.
32. Rule 10.9  
"Normal costs of communication" and "standard telephony" are difficult descriptions which are almost impossible to define due to the myriad of communications network operators which exist and the variety of tariffs they offer. The cost of a "normal" or "standard" telephone call to Ofcom's switchboard at noon on a Tuesday will vary according to the caller's telephone network tariffs, the caller's own tariff, and whether the call forms part of any call package the caller may have agreed with his/her operator. The problem becomes particularly acute when using non-geographic numbers such as 0845. Calls to 03 numbers, which are supposed to form part of consumers' call packages, are not currently supported by all the network operators.
33. We suggest the drafting of the guidance be amended to:
- Where broadcasters choose to use a method of communication which involves an outpayment by the communication network operator...
34. We also repeat here the representations made at paragraphs 16-19 above regarding the use of other methods of payments.

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<sup>3</sup> para 38, *ibid.*

35. Rule 10.11

The draft guidance includes the phrases “genres of broadcast content predicated on the use and promotion of premium rate services” which we believe is a helpful yardstick to be used in deciding whether a programme promoting premium rate services represents a “real offer of services”.

36. We would appreciate clarity on the statement that “Ofcom could only provide...a view” on whether a so-called “programme” is in fact advertising “following a formal investigation”. It is in neither Ofcom nor broadcasters’ interests for such an important question as the classification of a ‘programme’ to be left until after broadcast has occurred, by which time breach of the Broadcasting Code may have already taken place. It would be helpful to know whether Ofcom will be willing to provide advice in advance of transmission, on a case-by-case basis, as to whether a programme might or might not comply with rule 10.11 without fettering its ability to investigate and/or formally adjudicate on a programme post-broadcast.

*Considerations that would tend to suggest compliance with Rule 10.11*

37. • The PRS promoted within the programme clearly provides viewers with a genuine opportunity to participate in, contribute to or otherwise influence editorial content, e.g. entry to a competition, voting, on-air display of text messages, on-air discussion in a magazine-format show.

“Genuine opportunity” is open to misinterpretation here because it could be argued that the “opportunity” for viewers to actually contribute to a programme which invites, say, viewers to send in their comments on a particular issue is not genuine because the chances of their comments forming part of the editorial content is miniscule given the high volume of comments likely to be received. Similarly, a competition contestant’s opportunity to participate in a competition may be small. We suggest the word “genuine” is deleted.

38. • References within the programme to the PRS are occasional only  
“Occasional” suggests references which occur infrequently, from time to time, and not in a regular pattern. Yet programmes are likely to include references to the PRS according to the editorial requirements of the programme. A magazine discussion show which invites viewer comment or discussion is likely to want to promote the PRS regularly and frequently throughout the programme, particularly as the topic changes or new points are raised. Promotion of the PRS is therefore likely to be regular. A better approach is the one expounded in the next consideration which requires editorial justification for the amount of promotion for the PRS. We suggest the deletion of this consideration.

39. • The degree to which PRS is referred to within the programme is clearly justified by the degree to which the PRS contributes to editorial content.  
• PRS is clearly only one element of the broadcast content, e.g. as is often the case in a studio-based game show, a magazine-format show, a sports discussion show, or a reality show.

These two considerations would appear to be most relevant to two of the ECJ’s criteria to be used in assessing the classification of broadcast content. The purpose of the broadcast and the significance of the use of the PRS within the broadcast as a whole in terms of time can be assessed most easily by reference to the level of interaction or participation made possible by the promotion of the PRS, and the editorial content of the rest of the programme.

40. • On calling the PRS number promoted in the programme, viewers are not given advertising information or options other than participation in the programme.  
This recognises that messages which encourage further interaction or participation may still be used by broadcasters. We would appreciate clarity on whether products or services which fall within the definition of "programme-related material" may be promoted at this point.
41. • PRS calls are charged at the lower end of the range of PRS charges permitted.  
There is no clear definition of "the range of PRS charges permitted". Calls to 0900 and 0901 numbers cost up to 60p per minute with a maximum call cost of £5.00; or fixed cost of up to £1.00 per call. Calls to 0904, 0905 and 0906 are open-ended at any cost per minute or charged at a fixed cost per call at any rate. Services which cost more than £1.00 per minute, and which may cost more than £30.00 in total, require PhonepayPlus' prior permission before operating.
42. Other than that we are not aware of a maximum or minimum charge for PRS. It is therefore difficult for us to assess what "range" Ofcom is referring to and we would appreciate clarification.
43. • The programme is not primarily or wholly funded by revenues generated by PRS.  
We are unsure as to how this requirement will be assessed in practice. All of Five's programmes are funded by commercial activity of one sort or another; advertising makes up the bulk of this but there is an inevitable flow of revenue from PRS into the programming budget. We do not see the merit of Ofcom making detailed inquiries into the funding arrangements for individual programmes; nor do we see how this would be helpful.
44. We would also appreciate clarity as to how and whether the revenue generated through PRS will be distinguished from the budget for the programme itself. In programmes where significant levels of PRS activity is generated, for example voting in a reality or talent show, or competition entry in a magazine programme, the revenue from PRS may exceed the programme budget or expected revenue from advertising sold during and around the programme. Ofcom surely cannot intend that because a programme is capable of being funded wholly by revenue generated by PRS, it would not comply with Rule 10.11.

*Considerations that would tend to suggest a breach of Rule 10.11*

45. • The PRS does not clearly contribute to editorial content, e.g. in a chat-based service where all or most of viewers' calls are neither audible nor discussed on air.  
This should be distinguished from a situation in which the volume of calls or messages received results in most of viewers' calls not being aired.
46. • The programme appears in effect to be a promotional vehicle for the PRS. In particular, the PRS is promoted with a degree of prominence not clearly justified by its contribution to editorial content; there are excessively frequent calls to action, visual or oral; or a significant proportion of airtime is given to promoting the PRS or to featuring the PRS interaction.  
The wording of this consideration, which is the reverse of the consideration requiring the degree to which PRS is referred to within the programme content to be clearly justified by the degree to which the PRS contributes to editorial content, is in our view key.
47. However, the inclusion of the final section, "a significant proportion of airtime is given to...featuring the PRS interaction" appears to be contrary to the rest of the guidance.

One of the measures of the degree to which the PRS contributes to editorial content will be the amount of airtime given to interaction with the PRS element of the programme. It follows from the guidance that the more the PRS contributes to editorial content, the greater the degree to which referral to and promotion of the PRS may be justified.

48. It therefore cannot be the case that where a significant proportion of airtime is given to featuring the editorial content which is based on PRS interaction that would tend to suggest a breach of Rule 10.11. We therefore suggest the words "or to featuring the PRS interaction" be deleted from this sentence.
49. • On calling the PRS number promoted in the programme, the caller is presented with advertising messages or with options other than participation, e.g. to purchase a product or a service, or is subsequently sent marketing messages.

As stated above, we would appreciate clarification on whether the option to purchase programme-related material would tend to suggest a breach of Rule 10.11.

50. • The programme includes advertising-type messages about the PRS, e.g. 'cheaper calls', 'happy hour', '20% cheaper'.  
We have no comment to make on this consideration.
51. • PRS calls are charged at the higher end of the range of PRS charges permitted.  
As discussed above we would appreciate clarification of what Ofcom considers the "range of PRS charges permitted" to be.
52. • The programme is primarily or wholly funded by revenues generated by PRS, rather than by, for example, advertising revenues  
Many programmes are not funded by the advertising revenues directly attributable to the broadcast of the programme itself. Equally, the advertising revenues directly attributable to some programmes exceed the cost of making the programme; the surplus is used to fund other programmes, to pay the broadcaster's overheads, and to return a profit to shareholders.
53. PRS may be used as another method of generating revenue which is returned to the broadcaster. This revenue may well be used to fund programmes. As in the case of broadcast advertising, some PRS revenues will not fund the programmes in which they are promoted; others will exceed it. We do not believe the fact that the revenue from a PRS in a programme would or could exceed the cost of producing it should be a relevant factor in deciding whether a programme complies with rule 10.11 and would appreciate further clarity from Ofcom on how it will interpret and apply this consideration.
54. • In the case of a quiz or competition, the question or puzzle appears to be promoting a product or service. This is a separate consideration to sponsorship or prize donation.  
We assume here that Ofcom is referring to a third party product or service and this would not, for example, prevent broadcasters from posing questions about the editorial content of the programme in which the PRS is promoted. If this is the case, we suggest replacement of the word "a" with "another" before "product or service".

## Radio

**Q3. Do you agree that the proposed rules should apply to radio as well as to television?**



55. Five does not have any view other than to express the opinion that there would appear to be no reason for radio to have any unfair commercial advantage over television.

**Channel 5 Broadcasting Limited**  
**3 June 2008**