



# Participation TV Part 1: protecting viewers and consumers

Ofcom statement on consumer protection measures  
for viewers participating in programmes

Statement

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## Section 1

# Executive summary

## Background

- 1.1 This Statement sets out new measures to protect consumers and to help restore confidence in programmes that invite members of the public to participate in them via telephony, the internet or any other form of communication.
- 1.2 The treatment by broadcasters of viewers' and listeners' communications with them gave rise to serious public concern through much of 2007. Instances of poor practice, mostly concerning premium rate telephone services (PRS), led to serious breaches of Ofcom and PhonepayPlus (PP+) rules. Large fines have been issued by both bodies: Ofcom has imposed fines on television broadcasters totalling more than £3.5m; PP+ has levied fines against service providers totalling £580,000.
- 1.3 Because of the number and apparent seriousness of the breaches, in March 2007 Ofcom commissioned an Inquiry, led by Richard Ayre, a non-executive member of Ofcom's Content Board ('the Inquiry'). The Inquiry concluded that systemic problems were apparent in television broadcasters' use of PRS and made several recommendations covering PRS and other means of communication.
- 1.4 Ofcom consulted on the Inquiry's recommendations between July and October 2007 in *Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial* ('the Consultation'). This Statement details the outcomes of the Consultation.
- 1.5 The Consultation also considered, as a separate issue, the separation of editorial and advertising material in respect of programmes predicated on the promotion of PRS. That issue is not addressed in this Statement and is being considered separately (as Participation TV Part 2) – Ofcom expects to publish a further document on Part 2 shortly.

## New requirements for television broadcasters

- 1.6 Ofcom will be implementing almost all of the Inquiry's recommendations for television broadcasters following the Consultation. These divide into two core recommendations regarding broadcasters' fundamental responsibilities and a number of others concerning matters of guidance.
- 1.7 Ofcom has concluded that TV broadcasters' licences should be varied to make licensees directly responsible for communication with the public where the mechanism of communication features in programmes. This will mean that broadcasters assume responsibility for the management of all communications with the public, where these are publicised in programmes. This general responsibility applies to any means of communication. It will cover all forms of telephony, email and other internet-based communication, post and so on.
- 1.8 In addition to the above broad obligation, the licence variation will introduce a system of third-party verification where PRS is used for competitions or voting schemes. It is clear from Ofcom's investigations that all too often broadcasters themselves have not fully understood the PRS systems used in their programmes and therefore not anticipated potential problems. Verification by an independent third party will greatly

enhance broadcasters' confidence – and, more importantly, public trust – in PRS-based voting and competitions. It will also alert broadcasters quickly to deficiencies in compliance. The requirement for verification is restricted to PRS voting and competitions because abundant evidence points to these as being the principal source of problems.

- 1.9 Ofcom has designed the verification system to be flexible and expects that licensees of differing sizes will all be able to meet their new obligations. Some respondents argued that the introduction of a verification scheme would be too burdensome. We do not agree: our view is that if broadcasters are not willing to implement suitable oversight for these revenue-generating PRS applications they should not use them.
- 1.10 In addition to the licence variation, Ofcom will publish new guidance for broadcasters in respect of the new licence condition and also the requirements of the Broadcasting Code. The guidance will cover, amongst other matters:
- the stage at which shortlisting or selecting winners or successful entrants should begin;
  - the need to withhold results where significant failures of process are identified;
  - further information for users of 'red button' entry and voting;
  - the need to reveal puzzle methodologies; and
  - the need to improve pricing information.

### **PhonpayPlus: prior permission**

- 1.11 PhonpayPlus (PP+) is introducing a prior permission scheme for PRS service providers who provide services to broadcasters. (Some services, such as live chat services, have for a long time required prior permission because of the nature of the service provided, rather than its provision in broadcasting. Those arrangements will continue.)
- 1.12 In summary, PP+ will be introducing prior permission requirements in the following broad areas:
- Connectivity and capacity
  - Conduct
  - Coherence

### **Radio**

- 1.13 The Inquiry specifically examined television broadcasters and viewer communication and participation. It did not cover radio, although radio interests were alerted to it. 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 facts, Ofcom is not seeking to vary radio broadcasting licences at this time but will be consulting on extending the provisions to radio later in 2008.

## Implementation

- 1.14 Under Section 4(1) of the Broadcasting Act 1990 (the “1990 Act”) Ofcom has a wide discretion to set licence conditions including such conditions as appear to Ofcom to be appropriate having regard to any duties under the Communications Act 2003 (the “2003 Act”) and conditions providing for such incidental and supplemental matters as appear to Ofcom to be appropriate. Under Section 3(1) of the 2003 Act it is the principal duty of Ofcom 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.
- 1.15 Under Section 3(4) of the 1990 Act Ofcom 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 also is reflected in broadcasters’ licences.
- 1.16 Ofcom will therefore very shortly be formally notifying TV broadcasting licensees of the intended variations. Licensees will have four weeks in which to make representations to Ofcom.
- 1.17 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 the wide responsibility for communications from viewers will take effect immediately, but the narrower verification obligation will be effective after a further period, probably of three months. This longer period is to allow licensees to take the necessary steps to implement the verification obligation.
- 1.18 Although the verification condition does not in general require that licensees send reports to Ofcom other than at Ofcom’s request (likely to be in the event of an investigation), we will be operating a spot checking programme for the first 12 -18 months following the introduction of the condition. This is to allow Ofcom to be satisfied that suitable systems are in place and generally that the condition is being complied with.

## Section 2

# Background

## Failures by broadcasters

- 2.1 In early 2007 a number of incidents came to light which suggested serious failures in television broadcasters' handling of viewer votes and competitions. These incidents involved practices such as the faking of winners and unfair selection of competition entries. Further problems emerged throughout 2007, and broadcasters' integrity was cast into doubt, particularly where participation was by PRS.
- 2.2 In 2007, Ofcom published adjudications by the Ofcom Content Sanctions Committee about *BrainTeaser* on five<sup>1</sup>, *Blue Peter* on BBC1 (and CBBC)<sup>2</sup>, GMTV<sup>3</sup>, and *Richard & Judy*<sup>4</sup> and *Deal or No Deal*<sup>5</sup> on Channel 4. Each of these broadcasters was fined for serious breaches of the Broadcasting Code. Ofcom is currently investigating a number of other potential breaches, involving both PRS and other means of interaction.
- 2.3 In parallel to specific investigations, on 22 March 2007 Ofcom announced the launch of an inquiry ('the Inquiry') to consider whether there were any systemic reasons behind these compliance failures. Richard Ayre, a non-executive member of the Ofcom Content Board, was asked to lead the Inquiry and if necessary to recommend actions needed to restore confidence and trust in the use of PRS by television broadcasters.

## Inquiry into use of PRS in television

- 2.4 The Inquiry's terms of reference included consideration of:
- consumer protection issues and the extent to which viewers value PRS in television programmes;
  - the benefits and risks to broadcasters in the use of PRS in programmes;
  - the respective compliance responsibilities of broadcasters, producers, telecoms network operators and others involved in those programmes; and
  - the effectiveness of broadcasters' and telecoms operators' internal compliance procedures, guidelines and arrangements to ensure compliance with Ofcom and PhonepayPlus [then ICSTIS] codes.
- 2.5 The Inquiry was concerned with the use of PRS compliance on television. Radio was not included in the scope of the report, although radio interests were alerted to it. One of the Inquiry's recommendations was that, if Ofcom decided to consult on a proposal to amend the licences of television broadcasters to include provisions

<sup>1</sup> Full adjudication available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/channel5.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/channel5.pdf)

<sup>2</sup> Full adjudication available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/bbc.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/bbc.pdf)

<sup>3</sup> Full adjudication available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/gmtv.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/gmtv.pdf)

<sup>4</sup> Full adjudication available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/yswp.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/yswp.pdf)

<sup>5</sup> Full adjudication available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/dond.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/dond.pdf)

intended to enhance consumer protection, Ofcom should also seek views on the extension of these provisions to radio licensees.

- 2.6 The Inquiry's findings and recommendations were published in a report on 18 July 2007 (at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/>). The Inquiry commented on the apparent failure by many broadcasters to understand the fundamental nature of their obligations to viewers taking part in programmes:

“Perhaps the most important conclusion of this inquiry is the need to instil among broadcasters and producers a clear understanding that they have an obligation each and every time a viewer pays a premium in the expectation of receiving an additional service. An appreciation of the contractual nature of the relationship between the broadcaster and the viewer-consumer is important not because of its practical value to individual consumers who may want to seek redress, but because it clearly indicates that broadcasters offering PRS have a set of obligations to individual customers which go beyond their traditional responsibilities towards audiences as a whole. This inquiry is satisfied that that new relationship has not been adequately recognised or addressed by many broadcasters and that further regulatory intervention must be centred upon securing the broadcaster's delivery of its obligations.” (Report section 1.14)

- 2.7 The Inquiry concluded that it is broadcasters and their producers who have the most influence over the chain of operation and who wield by far the greatest economic power within the value chain. The Inquiry's view was that the single most effective regulatory measure would be to make broadcasters directly responsible for PRS compliance right through the supply chain, just as they are for broadcast content. The Inquiry therefore recommended that television broadcasting licences be amended to include a set of requirements associated with consumer protection in relation to PRS and any other direct commercial transactions. It also recommended that broadcasters should be required to undertake an independent audit of their PRS processes and systems and that Ofcom should consider extending the proposed licence variation to radio licensees.
- 2.8 In addition to recommending new licence obligations for broadcasters and independent verification of PRS use, the Inquiry also recommended that a series of other, more particular measures should be introduced as guidance on best practice<sup>6</sup>. Section 6 of this Statement explains how we are taking these recommendations forward.

### Consultation in July 2007

- 2.9 In July 2007, Ofcom published a consultation paper examining how Participation TV should be regulated ('the Consultation'<sup>7</sup>). This considered the Inquiry's recommendations for the protection of viewers and consumers, and also looked at a discrete (albeit related) regulatory question of keeping advertising separate from editorial content. This Statement does not address the second issue regarding advertising separation, which Ofcom is considering separately.

<sup>6</sup> See paragraphs 1.48 to 1.55 of the Inquiry's report.

<sup>7</sup> Available at <http://www.ofcom.org.uk/consult/condocs/participationtv/consultation.pdf>



- 2.10 Ofcom agreed with the Inquiry's conclusion that broadcasters should be directly responsible for PRS compliance throughout the supply chain. Moreover, Ofcom recognised that the problems identified by the Inquiry are not confined to financial harm incurred by viewers who take part in programmes by means of PRS, but also relate to fundamental issues of trust and integrity, whatever the means of communication.
- 2.11 The Consultation set out proposals for a licence variation, closely based on the draft licence variation suggested in the Inquiry report. The draft licence condition was intended to set out clearly broadcasters' compliance responsibilities; for example, a requirement for broadcasters to ensure that voting and competitions are conducted in such a way as to provide fair and consistent treatment of all eligible votes and entries.
- 2.12 The Consultation sought views from respondents on whether radio licensees should be subject to similar new requirements under their broadcasting licences.
- 2.13 In addition to the new licence obligations regarding all forms of communications from viewers, the Consultation proposed that a broadcaster's compliance processes in respect of PRS should include independent third party oversight or verification. Ofcom proposed this additional requirement following the Inquiry's recommendation and in view of the serious failings by broadcasters using PRS which came to light in early 2007. Verification would help to address a particular problem of PRS in that ineffective systems, or weaknesses within systems, are not otherwise easily detected in practice.
- 2.14 The Consultation sought views on three different options for verification, summarised below:
- Option A: Licensees should be responsible for the design of their verification systems, and should provide reports to Ofcom on request by Ofcom;
  - Option B: as Option A, but with a specified reporting cycle (e.g. annually); or
  - Option C: Ofcom should set out a detailed and prescriptive specification for verification, to be reported annually.
- 2.15 The Consultation, which closed in October 2007, sought views from stakeholders on the proposals for licence variation and independent verification. Section 5 of this Statement summarises the responses that we received. As discussed in detail in Sections 3 and 4, Ofcom has now decided to introduce new licence conditions for TV broadcasters, making them clearly and directly responsible for all communications from viewers publicised in programmes and, for particular applications (i.e. voting and competitions), also requiring independent verification of PRS use.

## Section 3

# Licence amendment

### The need for a new licence condition

- 3.1 The Consultation sought views on the Inquiry's recommendation of a licence variation to make television broadcasters directly responsible for communications which they invite from viewers. Section 5 of this Statement discusses the responses received from stakeholders.
- 3.2 Having carefully considered the responses, Ofcom has decided that the measures necessary to provide consumer protection and to promote public confidence in participation techniques – and trust more generally in broadcasting – are so important and so integral to licensees' operational obligations that licences are the appropriate instruments to use to implement these measures.
- 3.3 For all television licensees, therefore, variations to licences will be made such that, in summary:
- licensees become responsible for all means of communication with the public where that communication is publicised in programmes; and
  - for certain types of communication (i.e. PRS voting and competitions) a mandatory regime of verification will be introduced.
- 3.4 As the Inquiry recognised, there are clear advantages to a licence variation<sup>8</sup>:
- it is a significant response to what has been a significantly disturbing series of failures
  - it sends the strongest possible message to broadcasters of their direct responsibilities
  - it opens the route to a wide range of regulatory responses and sanctions according to the circumstances of any breach
  - it retains Ofcom as the single regulatory focus for broadcaster behaviour
  - it uses a well established and straightforward process for licence variation, though implementation would of course be subject to consultation
  - it can provide for measures, such as an audit requirement, that codes of practice cannot
- 3.5 Taken together these are, in Ofcom's view, powerful arguments for new regulatory measures and for their implementation through licences.
- 3.6 The proposed licence variation can be found at Annex 1 to this Statement. Section 4 discusses the verification requirement in more detail.

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<sup>8</sup> Inquiry report section 1.39

- 3.7 Ofcom will review the scope and substance of the new licence condition and of guidance if it becomes clear that abuses or failures in compliance are still occurring.

### Timing

- 3.8 Under section 3(4) of the 1990 Act Ofcom must give licensees a reasonable opportunity to make representation about licence variations. Ofcom will therefore be formally notifying television broadcasting licensees shortly after publication of this Statement of its intention to vary licences. Licensees will have four weeks from the date of the notification to make representations to Ofcom.
- 3.9 After that period Ofcom will send notices to all affected licensees confirming the final form of licence variation, if appropriate.
- 3.10 On confirmation of the licence variation Ofcom expects that the broad obligation on licensees to ensure the proper management of communications from the public would be effective immediately. However, we will allow a short period of time – probably three months – for the verification obligation regarding PRS votes and competitions to become effective. Ofcom therefore anticipates that verification processes should be in place and active by 30 June 2008. We will advise licensees of the final details of timing when we formally notify them that their licences have been amended.

### The effect of the licence changes

- 3.11 The new general obligations will be introduced by the following part of the 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.

- 3.12 The full licence variation is at Annex 1.
- 3.13 This part of the new licence condition will make TV broadcasters 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 viewers will become unambiguously a responsibility of the licence holder. (For the avoidance of doubt, these new conditions do not apply to any communications publicised in advertising time.)
- 3.14 The principal aim of the licence change is to ensure that where licensees solicit communications from audiences as part of the editorial content of a programme, viewers can be reassured that their calls, emails etc are treated properly. The most high-profile applications of these techniques are voting and competition schemes. It should be stressed, however, that all applications of viewer communication publicised in programmes are intended to be captured by the general responsibility created by the above extract from the licence variation.
- 3.15 Therefore the operational effect of this part of the new licence condition is that appropriate compliance arrangements are in place for the management of all viewers' communications encouraged through programme publicity.
- 3.16 PhonepayPlus<sup>9</sup> (PP+) is introducing a prior permission scheme for PRS service providers who provide services to broadcasters. (Some services, such as live chat services, have for a long time required prior permission because of the nature of the service provided, rather than its provision in broadcasting. Those arrangements will continue.)
- 3.17 Other uses of PRS in broadcasting are now subject to a new scheme under which a service provider must demonstrate that it has sufficient technical capacity, expertise and contractual clarity to be able to provide PRS services to broadcasters. If it deems it appropriate – generally because bad practice is established – PP+ can withdraw permission from a service provider, barring it from broadcast PRS work.
- 3.18 Therefore, television broadcasters should be aware that any service provider they contract with for broadcast PRS services must hold the necessary prior permission status.
- 3.19 Section 4 of this Statement describes the further obligations that are intended only for votes and competitions conducted using PRS. In these circumstances, broadcasters are required to have in place a system of third-party verification of processes (including review of particular programmes or series).
- 3.20 In brief, verification will be required when:
- viewer participation is by means of controlled premium rate services (as defined by the PRS condition made under section 120 of the Communications Act 2003)

The PRS condition can be found at

[http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/PRSCondition\\_2\\_.pdf](http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/PRSCondition_2_.pdf)

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<sup>9</sup> Formerly the Independent Committee for the Supervision of Telephone Information Services (ICSTIS).

- the nature of the viewer participation is voting or competition entry; and
- the PRS application (either a vote or competition) is publicised within programme time.

3.21 Reporting to Ofcom is in general intended to be confined to situations when significant irregularities are uncovered or when Ofcom has cause to ask for verification reports, such as in the course of investigating complaints. However, to ensure that broadcasters are complying with the new obligations, Ofcom will carry out an introductory schedule of spot-checks, expected to last for 12 to 18 months.

### **Enforcement and interpretation**

3.22 Breaches of licences carry the same range of sanctions as breaches of the Broadcasting Code. For example, Ofcom can direct a broadcaster not to repeat material, fine a broadcaster or revoke a licence. A full discussion of Ofcom's content sanctions procedures can be found in the document *Outline procedures for statutory sanctions in content and content-related cases*<sup>10</sup>.

3.23 As with all Code and licence obligations Ofcom will exercise its 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, including the degree to which the licensee has exercised diligence (including the use of service providers with PP+ prior permission status) and the extent of unforeseeable problems.

### **ITV**

3.24 Ofcom recognises the distinct position of ITV as a federation of licence holders. We expect to discuss with ITV the way in which the new obligations – both the generalised compliance responsibility for communications with the public and the more specific verification obligations – are handled.

### **The BBC**

3.25 Ofcom considers it important that similar compliance obligations should apply across the whole UK television industry. Implementing change through licence variation does mean that the BBC (and S4C) is excluded from the changes, a point noted by Richard Ayre in the Inquiry. The BBC Trust will consider the compliance arrangements in this area for the BBC in the light of this statement.

### **Radio**

3.26 Ofcom has decided at this time not to amend radio broadcasters' licences. Whilst we believe that there have been problems in radio programming, the Inquiry specifically examined television only. Also, we do not currently have sufficient data on radio's use of participative techniques, particularly those using PRS, to assess the impact for radio of the licence variation. However, Ofcom will be consulting in 2008 on similar measures for radio licensees.

### **PhonepayPlus**

3.27 In May 2007, PP+ issued a consultation on a prior permission regime for premium rate service providers who contract with broadcasters. PP+ has concluded that a

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<sup>10</sup> Available at <http://www.ofcom.org.uk/radio/ifi/ifi/iguide/sanctions/>.

form of prior permission is appropriate. The measures set out in this document take PP+'s conclusions fully into account.

- 3.28 In summary, PP+ will be introducing prior permission requirements in the following broad areas:
- Connectivity and capacity
  - Conduct
  - Coherence
- 3.29 Under these general subject headings more specific requirements are imposed. Among these are conditions governing the proper treatment by service providers of viewer responses, the management of excess peak PRS traffic, the closure of lines, random selection of winners, clear and coherent contractual arrangements, the role of senior management and systems back-up.
- 3.30 PP+'s statement on prior permission can be found at [http://www.phonepayplus.org.uk/pdfs\\_news/Statement\\_on\\_Participation\\_TV.pdf](http://www.phonepayplus.org.uk/pdfs_news/Statement_on_Participation_TV.pdf).
- 3.31 New governance arrangements<sup>11</sup> agreed between PP+ and Ofcom will allow much greater co-operation and combined action. Both bodies expect that investigations concerning broadcast PRS will require close liaison, and have prepared accordingly.
- 3.32 Viewers and consumers should direct any complaints or concerns about the use of PRS in programmes to Ofcom in the first instance.

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<sup>11</sup> Available at <http://www.ofcom.org.uk/media/news/2007/12/nr20071205>

## Section 4

# Verification

### Why verification is needed

- 4.1 The Inquiry report made clear that systems of third-party audit for PRS use by broadcasters should be introduced. It said that had such systems been in place licensees would have been aware generally of the poor practices adopted by them and their agents and they would have been able to put things right.
- 4.2 The Consultation sought views on both the principle of third-party verification of compliance systems and, if introduced, the broad parameters that should apply. Responses were mixed, but there was considerable support for a system of third party verification – see Section 5 of this Statement.
- 4.3 Among the responses the argument was made that there is no need for an imposed system of audit: licensees are now doing just this. Some respondents suggested that licensees have learned through painful experience to approach participation by viewers with much more care generally.
- 4.4 We do not find these points persuasive. Although licensees may now recognise the need to treat communications from their audiences properly, there is no guarantee that bad practice will not creep back in over time or that new licensees will inevitably take the same view. Also, we note that – without a specific obligation – many broadcasters would not choose to engage an independent third party but would carry out any verification in-house. In any event, where broadcasters are indeed already putting similar measures in place, the licence obligation will not impose an additional burden but will provide necessary reassurance for viewers and consumers.
- 4.5 A number of respondents also argued that imposing audit obligations would introduce unjustifiable burdens, especially on smaller licensees.
- 4.6 We do not agree that the size and resource of a licensee should decide whether or not they attract a requirement of audit. Indeed we strongly believe that in the particular case of PRS, where interactions constitute a revenue stream, there must be a proper system of oversight.
- 4.7 More generally, however, we do recognise the need for flexibility and proportionality in audit requirements. Licensees use PRS in different ways and to different extents, and we believe that the new requirement for independent third-party oversight should reflect this.

### Scope of verification

- 4.8 Three verification options were offered in the Consultation. Option A allowed licensees to decide for themselves what precise form the verification should take, and required them to provide a report to Ofcom on request. Option B also allowed licensees to decide the form of the verification but required them to report to Ofcom on a regular, specified basis, e.g. annually. Option C was the most onerous of the options, requiring licensees to undertake a formal audit in accordance with a detailed specification to be set out by Ofcom, and to provide annual reports to Ofcom. Having considered the consultation responses carefully, we have concluded that mandatory verification of PRS systems and independent scrutiny are an important and

necessary new requirement. However, we do not believe that external reporting to a prescribed cycle (as set out in Options B and C) is necessary or proportionate.

- 4.9 As previously mentioned, Option C also contained provision for specification of a verification scheme by Ofcom. Although some respondents favoured this approach, Ofcom considers that a rigid 'rule book' would greatly undermine the accepted need for flexibility. It is also the option least suited to adaptation in the face of future developments.
- 4.10 Our conclusion is that Option A best achieves the necessary balance by placing responsibility for suitable verification arrangements on the licensee – with mandatory third-party involvement – and reserving to Ofcom the right to request documentation and data at any time. Both of these core considerations are consistent with existing general programme compliance systems: Ofcom requires broadcasters to ensure compliance with the Broadcasting Code but does not prescribe the nature of those compliance processes. Further, we believe that the scope of the independent verification requirement should be limited to voting and competition schemes that use PRS.
- 4.11 In adopting Option A, however, Ofcom wishes to ensure that broadcasters are properly introducing third-party verification schemes. Ofcom will therefore introduce a programme of spot checks for the first 12 – 18 months after the verification obligation comes into force.

### **What the new requirement for verification means**

- 4.12 Television broadcasting licences will therefore be amended to include the following part of the new condition:
- 3(a) 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.
  - (b) Where the Licensee uses a Controlled Premium Rate Service as defined under the PRS Condition in force at the time made under section 120 of the Communications Act 2003 as the method of communication for voting or competitions, the Licensee shall ensure that its compliance procedures include a system of verification by an appropriate independent third party ('the third party'), in accordance with the following requirements:
    - (i) Verification shall include confirmation by the third party that an end-to-end analysis of the technical and administrative systems to be used for the receipt and processing of votes and competition entries from members of the public has been conducted and that such systems fulfil all the requirements set out in paragraph 2 above. All such systems and the analysis of such systems must be fully documented.
    - (ii) Verification shall include appropriately regular reviews by the third party of individual programmes. Such reviews must track all votes or competition entries through all stages from receipt, and the results of each review must be fully documented.



- (iii) The Licensee shall ensure that a Director of the Board (or, where there is no Board, an appropriate equivalent) ('the designated Director) has specific responsibility for verification.
- (iv) The Licensee shall ensure that the third party provides reports regarding analyses of processes (as specified under sub-paragraph 3(b)(i)) and reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)) to the designated Director. If significant irregularities or other problems are discovered, the Licensee shall ensure that these are reported forthwith to Ofcom.
- (v) The Licensee shall provide forthwith and in an appropriate form any information requested by Ofcom regarding verification.
- (vi) The Licensee shall retain for at least two years all relevant data regarding votes and competition entries from callers by means of Controlled Premium Rate Services and retain all documentation regarding the verification of its systems (as specified under sub-paragraph 3(b)(i)) and the reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)).
- (vii) The Licensee shall publish annually a statement signed by the designated Director confirming that he is satisfied that the Licensee has in place suitable procedures to fulfil the requirements of paragraph 3(b) and confirming the name of the third party engaged by the Licensee to fulfil the requirements of paragraph 3(b).

- 4.13 ("Paragraph 2" is the preceding paragraph of the licence variation. That paragraph sets out the general responsibilities that the licensee has towards the proper management of interactions from members of the public. The full variation is at Annex 1.)
- 4.14 Under the new requirement a licensee who offers PRS voting and competitions must:
- before using PRS in programmes for voting or competitions obtain verification from an independent third party that its end-to-end processes comply with the requirements set out in paragraph 2 of the new licence condition;
  - ensure that the independent third party regularly tests its use of PRS in programmes for voting or competitions;
  - decide the precise form of the verification and testing to be carried out by the independent third party; however, Ofcom is providing guidance to help broadcasters in this respect;
  - provide information about its compliance procedures and relevant data in a suitable form to Ofcom on request; and
  - publish annually a statement signed by a designated Director confirming that it has appropriate processes in place, and giving the names of the third party appointed.
- 4.15 Ofcom will not prescribe operational details and will not 'approve' any licensee's arrangements for PRS verification in advance. However, because data about and derived from the compliance systems must be made available to Ofcom on request, Ofcom may evaluate licensees' verification systems in the course of investigations triggered by complaints or for other reasons.

- 4.16 Although the verification option chosen by Ofcom requires reporting to Ofcom only on request and Ofcom expects that in the longer term such requests will generally be triggered by investigations, a programme of spot checks will be run by Ofcom over the first 12 -18 months following introduction of the verification obligation.
- 4.17 At this time, verification will be limited to PRS voting and competition entry because:
- they are the most popular form of broadcast PRS;
  - there is significant evidence of compliance problems with PRS-driven votes and competitions; and
  - in votes and competitions, consumers have no way of knowing whether their entry has been processed fairly.
- 4.18 The new licence condition is not aimed at independent verification of PRS-applications where the consumer can readily tell whether some problem or malpractice is present, as with chat-based services for example. Problems such as misleading descriptions of the service provided or undue delay on PRS lines will usually be apparent to consumers who can therefore complain, both to the licensee and to Ofcom. However, Ofcom may revisit the scope of the requirement for independent verification if there is evidence of widespread, and otherwise difficult to detect, problems in other PRS applications.
- 4.19 In concluding that responsibility for the design of PRS verification systems should rest with licensees themselves, Ofcom believes it should set out broad objectives and requirements. These serve both as basic minimum standards and as guidance to licensees and those they contract with to design and monitor their systems.
- 4.20 **The objectives and broad requirements that Ofcom will enforce through amended licences are set out below. The section that follows will be available on Ofcom’s website as a self-standing document alongside existing guidance on the Broadcasting Code<sup>12</sup>.**

## Objectives and requirements for systems of third-party verification of premium rate telephone services (PRS) used in programmes

### General

**Note:** Ofcom has concluded that a further consultation should be held about the position of radio licensees. **At the time of publication this section therefore applies only to television broadcasters licensed by Ofcom.**

All Ofcom television broadcasting licences contain a condition that licensees implement and maintain a system to verify the proper handling of premium rate telephone communications. This condition was introduced following the consultation document published in July 2007,

<sup>12</sup> The existing guidance is available at <http://www.ofcom.org.uk/tv/ifi/guidance/>

*Participation TV: protecting viewers and consumers and keeping advertising separate from editorial*<sup>13</sup>.

The design of verification processes is a matter for licensees. Ofcom will not advise on or 'approve' particular detail of schemes.

Ofcom reserves the right to ask for details in suitable formats as it requires. On these occasions Ofcom may review the systems being used by licensees in a particular case, e.g. a specific viewer competition, or more generally. Failures in compliance or inadequate arrangements for verification may constitute a breach of the licence condition and result in the imposition of a statutory sanction.

Because licensees are themselves responsible for the design and operation of their verification arrangements it is the licensee's responsibility to decide such matters as the frequency of checks on systems, particular programme arrangements and PRS traffic handling, as well as on the choice of third parties. The licence condition is therefore intended to allow licensees flexibility in its fulfilment.

However, Ofcom does expect that licensees will achieve certain minimum standards in the operation of their verification processes. This document sets out the high-level objectives and basic operational requirements expected.

## Terminology

Paragraph 3 of the new licence condition is intended to ensure that licensees put in place active systems to examine, monitor and report on the ways in which certain PRS applications are handled. Because these will entail scrutiny of, among other things, technical arrangements, programme production arrangements, communication measures between producers and others, record keeping and authentication of statistics, no particular term is more suitable than any other to describe the general approach. 'Audit' and 'verification', for example, are used in this document within their general meanings of assurance, assessment, evaluation and checking.

Further, as used here the terms 'verification', 'audit', 'compliance' and the like should be interpreted within the general context of Ofcom licence conditions and guidance offered against licences. They are not intended to carry any meaning, or attract any specific rules, that might apply in other contexts, such as financial audit.

## Scope

Verification measures, to include third-party advice and scrutiny, are required only for certain applications of controlled premium rate services (PRS) used in programmes. At this time, Ofcom requires verification only where all three of the following criteria are satisfied:

- Viewer participation is by means of controlled premium rate services (as defined by the PRS condition made under section 120 of the Communications Act 2003)

The PRS condition can be found at [http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/PRSCCondition\\_2\\_.pdf](http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/PRSCCondition_2_.pdf);

- The nature of the viewer participation is voting or competition entry; and

<sup>13</sup> The consultation document and subsequent statement are available at <http://www.ofcom.org.uk/consult/condocs/participationtv/statement>

- The PRS application (either a vote or competition) is publicised within programme time.

For the avoidance of doubt, nothing in this document applies to the use of PRS or other communication methods in advertising time.

**Note:** At present, controlled premium rate services are those for which calls cost more than 10 pence per minute or more than a 10 pence single charge. However, Ofcom is presently considering changing the terms of the PRS condition. This may mean that a broader range of revenue-share calls falls within the definition.

‘Voting’ means schemes in which viewers are invited to register a vote to decide the outcome of a contest of any sort within a programme, or the outcome of any stage in such a contest. Viewer voting schemes are typically used to decide the fate of contestants in ‘reality’ competitions, but can be used to select winning entries in contests between any competing parties, for example historical figures, sports personalities or monuments.

For the purposes of verification required by the licence condition, voting does not include opinion polls, that is schemes in which viewers are asked to express a point of view by choosing a preference on a topic but where the outcome is confined to gauging a balance of opinion.

The definition of competitions does not include any gambling activity licensed by the Gambling Commission.

**Note:** Television broadcasting licences make licensees responsible for all means of communications with audiences that are publicised in programmes. Therefore, licensees should consider with the utmost care the management of votes, competition entries and all other participation techniques whatever mode of communication is used. Breach of the licence may result in the imposition of a statutory sanction. The new licence conditions make clear that compliance procedures must be in place for all communications with the public that are publicised in programmes, whether they attract the need for third-party verification or not.

## Objectives

Ofcom expects that verification of PRS applications, as defined above, will protect viewers and consumers, inform licensees and allow effective action by the regulator. The objectives of verification are, therefore, to promote *trust*.

It has been clear to Ofcom through investigations that too often broadcasters themselves did not know enough about the processes applied to the handling of viewers’ interactions – principally premium rate phone calls – they were inviting in their programming. Third-party oversight of these processes will greatly enhance broadcasters’ confidence – and viewers’ trust – in their use of PRS. The assurance measures, all dependent on advice and agreement from appropriate parties external to the broadcaster, cover both end-to-end examination of systems and scrutiny of particular uses within programmes and series; and the verification should be done in a way that is capable of detailed interrogation and is documented thoroughly.

Where shortcomings are identified, either in design or operation, they can be put right and if necessary reported to the regulator. Verification is intended to address the systemic bad practice which has been apparent in some cases.

## Requirements

Ofcom has set out the basic requirements of a licensee's verification processes in the amended licences. The discussion below seeks to add guidance to these requirements; to allow licensees better to understand the obligations placed on them.

- **Where the Licensee uses a controlled premium rate service as defined under the PRS Condition in force at the time made under section 120 of the Communications Act 2003 as the method of communication for voting or competitions, the Licensee shall ensure that its compliance procedures include a system of verification by an appropriate independent third party ('the third party'), in accordance with the following requirements:** (Licence amendment 3(b))

See the discussion on Scope, above, in respect of controlled PRS and definitions of voting and competitions.

To ensure public trust, it is essential that independent third parties should advise on and scrutinise the processes that licensees adopt for their use of PRS.

What constitutes 'appropriate' is a matter in the first instance for each licensee. Large or complicated PRS systems will require correspondingly sophisticated third-party input; simpler operations will require less complex third-party analysis. However, in all cases, licensees must be able to demonstrate to the satisfaction of Ofcom that the third party chosen has appropriate expertise in the relevant fields.

The relevant specialisms and fields of expertise that licensees are likely to require in third parties include, but are not limited to, systems analysis, data security, risk assessment, audit, telecommunications network design and PRS provision. In some of these fields experience and expertise will be covered by professional qualifications.

Third-party involvement will extend at least to agreeing the form and outcomes of prior assessment of systems and applications, and of the review of particular uses of PRS – see the following requirements below.

- **Verification shall include confirmation by the third party that an end-to-end analysis of the technical and administrative systems to be used for the receipt and processing of votes and competition entries from members of the public has been conducted and that such systems fulfil all the requirements set out in paragraph 2 above. All such systems and the analysis of such systems must be fully documented.** (Licence amendment 3 (b) (i))

Full assessment of the technical and administrative chains used for the receipt and handling of PRS interactions is fundamental.

This requirement applies to all the stages of interaction including, as appropriate: choices of network (capacity, latency, reliability etc); production issues such as the periods built into programming for voting and competition entry deadlines; and aggregation of votes and entries (which are likely to come from different routes in many cases). Clearly, the

independent analysis must include intermediate, mostly technical, services supplied by contractors, with requirements of record keeping, time stamping and so on, as necessary.

It is likely that licensees will maintain 'backbone' PRS handling systems, or at least that elements of a PRS 'chain' will be common to different uses of PRS. New programmes or series that involve PRS votes or competitions, or both, will often use background processes that have been examined and 'signed off' recently. Prior assessment may therefore be taken into account where appropriate. But for every new use – essentially every new programme or series that uses PRS voting or competitions – a full end-to-end assessment must still be undertaken, even if some or much of the system can be treated as having been checked.

The process and outcomes of system evaluations must be fully documented and reports made to the appointed board member (see below for board level reporting).

Documentation must be capable of demonstrating the analysis undertaken and the reasons for accepting the system design. Because this documentation is intended for both the licensee and the regulator, it should be prepared in way that allows it to be used to demonstrate intelligibly to those without detailed knowledge of the particular verification regime that proper rigour has been applied.

- **Verification shall include appropriately regular reviews by the third party of individual programmes. Such reviews must track all votes or competition entries through all stages from receipt, and the results of each review must be fully documented.** (Licence amendment 3 (b) (ii))

It is implicit from 'appropriately regular' that Ofcom does not expect that every individual programme's or series's use of PRS votes or competitions need be subject to particular review (although full records of interactions and their processing must be kept for all – see below). We expect, though, that larger schemes, particularly those run by public service broadcasters, will attract more regular scrutiny than more modest ones: in some cases it may be that on the advice of the third-party a big series or large, regular competition will attract continuing audit.

The reviews must be fully documented and reports made to an appointed board member (see below for board level reporting).

- **The Licensee shall ensure that a Director of the Board (or, where there is no Board, an appropriate equivalent) ('the designated Director') has specific responsibility for verification.** (Licence amendment 3 (b) (iii))
- **The Licensee shall ensure that the third party provides reports regarding analyses of processes (as specified under sub-paragraph 3(b)(i)) and reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)) to the designated Director. If significant irregularities or other problems are discovered, the Licensee shall ensure that these are reported forthwith to Ofcom.** (Licence amendment 3 (b) (iv))

The process of verification (including audit of individual programmes) is intended to assist licensees to know as far as possible whether their systems are sufficiently robust. It should act both to pre-empt problems and quickly detect those that may nevertheless occur. This must entail a reporting line to the most senior decision making level within a licensee.

It is likely that the Board Director with existing audit responsibilities will be the 'designated Director'. This may be a non-executive Director.

The designated Director must inform Ofcom of significant or systematic problems. Not to do so is likely to be regarded as a serious breach of the licence.

The designated Director should create written records of his or her acknowledgement of reports supplied by the third party. Such records may be asked for by Ofcom.

- **The Licensee shall provide forthwith and in an appropriate form any information requested by Ofcom regarding verification.** (Licence amendment 3 (b) (v))

Keeping records of what has been assessed and how it has been assessed is crucial to the proper running of processes and their review, both internally and externally. Ofcom may require these documents themselves.

However, in the longer term Ofcom anticipates that it is more often likely to require documentation from particular audits of programmes or series than evidence of verification systems more generally. Where this or any other operational documentation is asked for it should be made available straightaway and in a form that can be readily assessed by Ofcom. Simple print-outs of data and similar are unlikely to be acceptable. Ofcom expects that in many cases summary formats of audits will be appropriate, at least at an initial stage of investigation.

- **The Licensee shall retain for at least two years all relevant data regarding votes and competition entries from callers by means of Controlled Premium Rate Services and retain all documentation regarding the verification of its systems (as specified under sub-paragraph 3(b)(i)) and the reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)).** (Licence amendment 3 (b) (vi))

Under this requirement, records must be maintained of all interactions from members of the public at all stages. 'Interactions' will be any votes or competition entries from consumers; 'stages' will be all points at which interactions are recorded and processed, whether carried forward or, in the case of competitions, eliminated. This requirement is self-limiting: the fewer the interactions, the fewer the records.

Where questions arise about an instance of a licensee's use of PRS, it may be that no particular programme or series audit was performed at the time. But Ofcom expects that the data will be readily available for such an audit to be performed at some later point.

Because voting and competition schemes invite and aggregate individual interactions, it is crucial to the testing of any system that audit can disaggregate, i.e. that it can determine how any individual entry was handled.

The two-year retention requirement is a minimum period. Ofcom's experience from investigations of code breaches has been that records are generally available for longer.

- **The Licensee shall publish annually a statement signed by the designated Director confirming that he is satisfied that the Licensee has in place suitable procedures to fulfil the requirements of paragraph 3(b) and confirming the name of the third party engaged by the Licensee to fulfil the requirements of paragraph 3(b).** (Licence amendment 3(b) (vii))

This requirement is important for licensees publicly to demonstrate continuing attention to the responsibilities placed upon them. It will help to ensure that the public is aware of the licensee's commitment to rigorous compliance and give Ofcom reassurance that proper processes are in place.

The statement need not be approved or endorsed by the third party and need reveal no more than the limited information referred to in the licence sub-paragraph itself.



## Section 5

# Summary of responses

## Introduction

- 5.1 In the July 2007 Consultation, Ofcom raised a number of questions about its proposals for increased viewer and consumer protection, and requested comments from stakeholders. Ofcom received 39 responses in total on these questions. Of these, 11 respondents requested that their responses be kept confidential in their entirety and 1 requested that their identity be kept confidential. Non-confidential responses were received from: Advisory Committee on Older and Disabled People (ACOD), Bang Media, BT, Channel 4, DNV IT Global Services, Emap Radio, ERA UK, Five, Hammonds Solicitors, ITV plc, Million 2-1, Mobile Broadband Group, MX Telecom, NOC, Ostrich Media, PACT, Peripatos Ltd, PhonepayPlus (PP+), PromoVeritas, S4C, SBS Broadcasting Networks, Teletext Ltd, The Local Radio Company, The Premium Rate Association, The Radio Centre and UTV Radio, and an individual.
- 5.2 All non-confidential responses are available on Ofcom's website. We have summarised the responses below and included Ofcom's comments where relevant.
- 5.3 In addition to proposals for increased viewer and consumer protection, the consultation paper considered the separation of advertising and editorial. Stakeholders' responses on that issue are not included in this Statement, and will be addressed separately.

***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.***

- 5.4 32 out of 39 respondents agreed that television broadcasters should be responsible for PRS in programmes, although several respondents were concerned about third-party failures that were not fully within the control of broadcasters. Some respondents, including two service providers, pointed out that broadcasters control the relationship with the viewer, and that broadcasters take the bulk of the revenue generated by PRS. Channel 4 said that the viewer places trust in the broadcaster. Ostrich Media, which produces Quiz Call, said that a more rigid control of the process would demonstrate that the public's rights are being safeguarded. PP+ was also in agreement with Ofcom's proposal.
- 5.5 Some respondents - including PromoVeritas, Five, ITV and one other broadcaster, who responded in confidence - stressed that although broadcasters should exercise due care, they should not be held directly or solely responsible for failings outside their control by other companies in the supply chain, for example service providers and independent production companies. In particular, several broadcasters, including Channel 4 and Five, emphasised that broadcasters may not have the expertise to deal with the technological aspects of managing PRS. ITV said that broadcasters may not always be able to contractually protect themselves, and independent production companies have the right to appoint service providers.
- 5.6 Five said that it was working with Channel 4 to publish an "Independent Producers' Handbook" to explain compliance duties to their main suppliers. Similarly, PACT, a trade association for the independent production sector, said that it is developing

dedicated training, advice and guidelines for its members. UTV Radio felt that whilst broadcasters must take responsibility for their output, the burden of regulation or compliance issues should fall on service providers, and that broadcasters should not have to become service providers themselves. One broadcaster, Bang Media, thought that further regulation was required to ensure that service providers have an incentive to agree to broadcaster requests.

#### **Ofcom's response**

Ofcom is pleased to note that the majority of respondents supported the recommendation that broadcasters should be directly responsible, and welcomes compliance and training initiatives within the broadcasting industry.

Insofar as concerns were raised about the extent of broadcasters' responsibility, in considering the seriousness of any breach of the new licence condition, and whether a statutory sanction should be imposed, Ofcom would of course need to take into account the particular circumstances in which the breach arose.

Generally, Ofcom believes that broadcasters who seek interaction from viewers, in many cases using mechanisms that raise revenue for them, should be responsible to Ofcom for the proper management of the communications they solicit, irrespective of whether they have contracted with others.

- 5.7 Five said that it supported the PP+ prior permission proposal. Under this proposal, service providers would have to seek permission from PP+ to operate broadcast PRS. Five explained its belief that a PP+ prior permission scheme should sit alongside Ofcom's regulation of broadcasters.

#### **Ofcom's response**

PhonepayPlus (PP+) is introducing a prior permission regime for PRS service providers who supply service to broadcasters. This scheme will operate alongside the changes detailed in this Statement. Service providers will continue to be regulated under PP+'s Code and other requirements.

- 5.8 A number of respondents – including Five, MX Telecom, the Mobile Broadband Group, Million 2-1 and UTV Radio – wanted clarification of the potentially conflicting roles of Ofcom and PP+, and some stressed the need to ensure consistency in the requirements imposed. MX Telecom suggested that Ofcom should take primary responsibility for investigating potential breaches and that, if Ofcom concludes that non-compliance arose through reasons beyond the broadcaster's control, the matter should be referred to PP+. The Mobile Broadband Group said mobile operators already have considerable obligations under the PP+ code and it would not be justifiable to place new obligations on them. It also said that thought should be given to how the new arrangements would be communicated to the public and that it presumed that the new obligations would also extend to the BBC.

#### **Ofcom's response**

Ofcom sees no conflict between the roles of Ofcom and PP+ in the revised arrangements proposed by Ofcom for broadcasters. Ofcom is the lead regulator in broadcast PRS but will collaborate with PP+ whenever necessary. New governance

arrangements<sup>14</sup> agreed between Ofcom and PP+ make concurrent or joint investigations easier and swifter.

As noted in the response above, service providers continue to be regulated by PP+. Changes to broadcasters' licences would not affect that position. Whether Ofcom alone needed to investigate a case or whether concurrent investigations by both regulators were necessary would depend on the facts.

Ofcom plans appropriate publicity for the changes.

As was noted in the Inquiry report and in the Consultation document, licence changes would not affect the BBC (or S4C). It is for the BBC Trust to decide how the use of participation techniques, particularly PRS, should be governed within the BBC. The BBC will continue to be subject to the majority of Ofcom's Broadcasting Code.

- 5.9 One respondent, who responded in confidence, believed that broadcasters should be responsible for programme content, but not the promotion of a service or the call content. It also believed that service providers should have a greater role to play, in terms of advising broadcasters on the training required to help them comply.

#### **Ofcom's response**

It is a broadcaster's choice whether to promote a PRS in its programme, and it seems odd to suggest that the broadcaster should have no responsibility for its on-air promotion or the content of the call. Ofcom considers it entirely consistent with existing requirements under the Broadcasting Code that broadcasters must ensure that the content of PRS promoted in programmes is appropriate, for example that adult chat services must not be promoted in pre-watershed programmes. While broadcasters may well find it helpful to liaise with service providers, Ofcom believes that the decision on how to discharge their responsibilities under the new licence condition should remain with broadcasters.

- 5.10 Several broadcasters were concerned by the extension of responsibility to "other forms of communication" beyond PRS.

#### **Ofcom's response**

Ofcom believes that broadcasters should be directly responsible for all forms of interaction with programmes. The precise nature of the responsibility – and the seriousness of any breach – will depend on the individual facts. For example, where participation is by means by PRS, this may exacerbate the seriousness of a breach, compared to participation via the internet or by post, because of the greater potential for financial detriment to viewers and listeners.

***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?***

- 5.11 24 out of the 33 respondents who answered this question agreed that a variation to television licences was the most appropriate way forward. However, some

<sup>14</sup> <http://www.ofcom.org.uk/media/news/2007/12/nr20071205>

broadcasters, including ITV and Five, thought that Ofcom should instead amend the Broadcasting Code or guidance to the Code.

#### **Ofcom's response**

Ofcom believes that there are a number of advantages associated with amending the licences of television broadcasters. It is a significant response to a significant series of failures and sends the strongest possible message to broadcasters of their direct responsibilities. It retains Ofcom as the single regulatory focus for broadcaster behaviour, ensuring clarity, which was highlighted as an important issue in the responses. It also allows flexibility, permitting a wide range of regulatory responses that can be suited to the circumstances of any particular breach, and it can provide for measures such as independent verification that could not be required by means of the Broadcasting Code. Finally, it uses a well established and straightforward process for licence variation.

Having considered all the responses, Ofcom has decided that a licence variation is the most appropriate response to the clear need for increased viewer and consumer protection. We will therefore be amending the licences of all licensees that provide television content services. There is a formal process for licence variation under which licensees are given a reasonable opportunity to make representations.

We have revised the licence variation, in light of responses to the consultation (including requests for greater clarity). The revised version is provided at Annex 1 of the Statement.

***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.***

- 5.12 Of the 34 respondents who answered this question, 17, including BT, Channel 4, Five, Ostrich Media and PhonepayPlus, agreed that there is a need for broadcasters to obtain independent third-party verification. Ostrich Media, which produced Quiz Call, said that it had already undergone independent verification three times since 2005 and would be happy with any of the options suggested. Those who disagreed, including ITV, S4C and four radio broadcasters, felt that the proposal was disproportionate. The radio broadcasters who disagreed highlighted the difference in magnitude between revenue raised from PRS by broadcasters in television and radio.

#### **Ofcom's response**

Ofcom notes concerns about proportionality. That is a key reason why Ofcom has decided not to impose a prescriptive 'one size fits all' system of audit on television broadcasters. However, we also recognise that broadcasters need clarity. Therefore, as explained in detail in Section 4 of this Statement, the new licence variation sets out clear minimum requirements for independent verification whilst also allowing broadcasters an appropriate degree of flexibility. Ofcom is providing guidance to help broadcasters comply with the new requirement for independent verification.

Under the new licence obligations, the requirement for independent verification applies only to voting and competitions involving PRS. However, Ofcom may revisit this in future if necessary.

Ofcom recognises that further information and analysis is required before a decision is made on the need for radio broadcasters to obtain third party verification. To this end, Ofcom has decided to vary the licences of television broadcasters only at this time. We will be consulting later in 2008 on similar measures for the radio industry.

- 5.13 ERA UK, representing electronic retailers, said that advertising channels and broadcasters who do not use premium rate services should be exempted.

#### **Ofcom's response**

BCAP's Television Advertising Standards Code already provides significant consumer protection in respect of advertising content, and Ofcom does not consider it necessary or proportionate to impose audit requirements in respect of such content. The licence variation makes clear that it applies to programmes only.

The Inquiry found that participation in television programmes raises important questions of viewer trust, not limited to concerns regarding financial detriment. Whilst in practice many of the problems that have occurred relate to the use of PRS, similar errors which lead to audiences being misled or otherwise treated unfairly could clearly also arise through other forms of participation, eg postal entry.

It is therefore crucial that broadcasters are responsible under their licences for all viewer participation, irrespective of the means of communication. However, the additional requirement for independent verification applies only to voting and competitions involving PRS.

- 5.14 ACOD suggested that there was a danger that broadcasters may do what is just necessary to meet third-party standards.

#### **Ofcom's response**

Under the new licence variation, Ofcom will be able to consider whether it believes that broadcasters' compliance procedures are appropriate. Third party verification should help broadcasters meet the conditions of their licence, rather than specify what compliance procedures broadcasters should have in place.

- 5.15 Some respondents were concerned about the cost and implementation of third party verification, particularly for small broadcasters. One broadcaster said that Ofcom should consider alternatives, such as internal verification. Bang Media suggested that broadcasters should be required to maintain records to a set standard which could be requested by Ofcom giving a reasonable notice period. A radio broadcaster submitted a similar suggestion on maintaining records rather than requiring third party verification.

#### **Ofcom's response**

A need for third-party audit was identified by the Inquiry. Ofcom is persuaded that such a measure is necessary.

In the wake of exposure of very serious irregularities many broadcasters have themselves elected to call in third parties to assess their systems and examine their records. The value of such measures is not in doubt.

Ofcom's proposals for an obligation of third-party verification of systems and the handling of viewers' PRS interactions are flexible and self-limiting: the burden of verification need only reflect the scale of PRS use – and therefore PRS revenue.

As noted above and detailed in section 4 of this Statement, verification is presently confined to PRS voting and competition schemes.

- 5.16 Some respondents, including Peripatos and ITV questioned whether there were enough qualified third parties who would be able to perform verifications.

#### **Ofcom's response**

Ofcom considers that there is a wide variety of third parties that would be able to provide verification services, for example accountants, lawyers, systems analysts, PRS experts and risk management specialists. Our enquiries lead us to conclude that there is sufficient capacity in the relevant specialisms to meet the new obligation.

- 5.17 Views on which option for verification was the most appropriate varied:

#### **Option A: Regular (e.g. annual) independent verification, no specific scheme prescribed by Ofcom, reporting to Ofcom on request only**

- 5.18 Six respondents - including Peripatos, Emap Radio, ERA UK, and NOC - favoured this option. In addition, two respondents who disagreed that there was a need for broadcasters to obtain third party verification said that they preferred Option A. However, PromoVeritas and DNV IT Global Services thought that the verification put forward in this option was not comprehensive enough and would result in inconsistency across broadcasters. NOC, a trade association representing the UK premium rate interactive market, favoured this option, although it also said that some of its members thought that more frequent audits may be useful.

#### **Option B: Regular (e.g. annual) independent verification, no specific scheme prescribed by Ofcom, regular reporting to Ofcom (e.g. annually)**

- 5.19 Six respondents – including Five, ITV, PromoVeritas, and DNV IT Global Services – favoured Option B. Five and ITV, which did not agree that there was a need for third party verification, thought that, of the options, B was the most appropriate. PromoVeritas commented that Option B encompasses both the flexibility of Option A and the rigour of Option C. However, two respondents, including ERA UK, felt that this option was too expensive.

#### **Option C: Formal annual audit, detailed audit specification prescribed by Ofcom, annual reporting to Ofcom**

- 5.20 Four respondents – including The Premium Rate Association, Hammonds Solicitors, Million 2-1 and Channel 4 – supported Option C. Channel 4 believed that it would provide certainty over standards required. Two further respondents, who disagreed with the need to obtain third-party verification, said that of all the options they

preferred Option C. However, six respondents, including ITV, said that this option was disproportionate and too costly. Of these six respondents, DNV IT Global Services commented that this option would ensure consistency but that it would be difficult to create a specification that would suit all broadcasters and be able to adapt to future developments. Hammonds Solicitors thought that an enhanced version of Option C was required, to be consistent with the stringent criteria required by the Gambling Commission.

#### **Ofcom's response**

As previously discussed, Ofcom has concluded that Option C is not proportionate. Neither, as was pointed out by a respondent, is it likely to offer ready adaptation for future developments. However, we recognise that broadcasters need clarity. We have therefore amended the licence variation accordingly. It will set out clear minimum requirements for independent verification whilst also allowing broadcasters an appropriate degree of flexibility.

In terms of reporting, we have decided that it is an unnecessary regulatory burden – both for broadcasters and for Ofcom – to require broadcasters to submit annual reports regarding their verification processes (including audits of individual programmes). However, broadcasters will be required to publish a basic annual public statement confirming that they have had suitable systems in place and giving the names of the independent third party or parties engaged.

Moreover, Ofcom wishes to be confident that that broadcasters are from the start taking their new responsibilities seriously and putting in place appropriate measures for independent verification.

Therefore, for a period of about 12 to 18 months from the date that the new licence conditions come into effect, Ofcom will conduct a programme of active monitoring, with requests for information from broadcasters. After this initial period, we will revert to the level of reporting envisaged under Option A, whereby we would tend to request verification information only if we had specific reason for concern, e.g. in the event of a whistleblower, supplemented by the annual public statement.

***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.***

- 5.21 A number of respondents provided comments on the draft licence variation. One broadcaster, who requested confidentiality, said that the drafting of the licence variation should be subject to further consultation.

#### **Ofcom response**

Ofcom has amended the licence variation in the interests of clarity. The substance is essentially unchanged from the draft version included in the Consultation and Ofcom is not required to re-consult. However, in accordance with the statutory process for licence variations, Ofcom will be writing to all relevant licensees to give them an opportunity to make formal representations on the new licence condition.

- 5.22 Teletext agreed in principle with the draft variation licence but proposed an alternative variation for its own licence with Ofcom and BCAP verifying its compliance procedures.
- 5.23 A number of respondents emphasised the importance of working with other organisations. PromoVeritas, an organisation providing third party verification services, said that the licence should refer to statutory laws on games of chance and games of skill. Other respondents also commented on this area, saying that it was important to check consistency with requirements of the Gambling Commission, the Advertising Standards Authority (ASA) and the recent European Court of Justice ruling.

#### **Ofcom response**

Ofcom takes the view that all television broadcasters' licences should be similarly amended. The essential requirements of responsibility for proper management of viewers' participative interaction and the need for verification in particular circumstances should be common to all. Differences of scale are reflected in the design of verification obligations.

In the area of competitions, gambling law and Gambling Commission requirements must of course be observed. But the licence changes are not a product of gambling law concerns: they are driven by the general objective to secure trust, whatever application of participation a broadcaster may choose.

The changes cover only programming and are therefore not relevant to the ASA's work.

Ofcom is considering the European Court of Justice ruling regarding a recent Austrian 'quiz TV' show separately in the second part of its review of the regulation of Participation TV.

- 5.24 ACOD suggested adding a paragraph on broadcasters' duties under the Disability Equality Act. It also said that broadcasters should be required to specify the measures that they take to ensure that disabled participants can access and understand rules and prices before being charged.

#### **Ofcom response**

This raises important concerns that extend beyond the scope of the consultation. Ofcom is active generally in the field of disability and access to broadcast and telecommunications services.

- 5.25 Two respondents, Million-2-1 and UTV Radio, questioned how reasonable skill and care would be quantified. SBS Broadcasting Networks questioned how Ofcom would judge what was "reasonably foreseeable" and "materially misleading". It also said that Ofcom should be able to elaborate on the circumstances that it believes will give rise to disadvantage to the public. S4C also asked for more clarification of the concept of "disadvantage".
- 5.26 Five said that the requirement to exercise reasonable skill and care should apply to all elements of clause 2(a), so that broadcasters are not held responsible for the failings of contracted third parties. Five also believed that sub-clause 2(a)(iii) was



inappropriate as the issue of pricing is already dealt with in the PP+ code. It also commented that clause 2(b) makes no material change as licensees are already obliged to abide by the PP+ code under Rule 10.10 of the Ofcom Broadcasting Code.

#### **Ofcom response**

In the interests of clarity and having noted drafting suggestions from respondents, we have now amended the licence variation.

Ofcom accepts that in some cases the responsibilities imposed by the licence changes do exist already for licensees through the Broadcasting Code, for example in responsibility for the fairness of competitions. But the new responsibilities are drawn more widely.

- 5.27 SBS Broadcasting Networks raised the issue of broadcasters licensed in the UK but operating services in other territories. It said that the requirement to comply with the PhonepayPlus code could be inconsistent with the regulatory system in other territories.

#### **Ofcom response**

Where the PP+ code cannot apply Ofcom would not seek adherence to it – although the general principles of good practice it sets out would offer guidance to Ofcom broadcasting licensees operating in other territories.

All television broadcasting licences already contain an essentially similar requirement in respect of advertising.

- 5.28 S4C commented that the expression “where such communication is publicised in programmes” is too vague.

#### **Ofcom response**

We do not agree. The term is clear as used in the licence variation.

#### ***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.***

- 5.29 28 respondents - including Peripatos, BT, Bang Media, ITV and PhonepayPlus - agreed that the draft licence obligations should also apply to radio broadcasters. Many believed that it was consistent to apply obligations irrespective of the medium, and that radio was liable to the same risks of consumer detriment.
- 5.30 However, there were some concerns, particularly from the radio industry. Channel 4, PACT, The Local Radio Company, The Radio Centre and UTV Radio were concerned about the proportionality of applying the same draft licence variations to radio. Emap said that many premium rate telephone lines run by radio stations are often used for listener requests and comments.
- 5.31 Some respondents, including The Local Radio Company, and the Radio Centre were particularly concerned that the radio industry would be unable to continue running

some PRS if a costly audit process was imposed. Several respondents with radio industry interests commented that PRS revenues are much lower for radio than for television and Emap said the scale of PRS activity on radio was not of the same magnitude as that on many TV services. Two respondents, including the Radio Centre suggested that the comprehensiveness of verification could be varied according to the amount of revenue generated through PRS.

- 5.32 Channel 4 suggested that an external audit could be used as a sanction for a serious breach, rather than as a requirement for all radio broadcasters running PRS. SBS Broadcasting Networks made a similar suggestion in relation to all broadcasters.

#### **Ofcom's response**

Whilst there was general agreement that radio broadcasters should have direct responsibility for PRS and other forms of communication in programmes, Ofcom acknowledges concerns raised by the radio industry about imposing a requirement for third-party verification, bearing in mind that the Inquiry focused on problems within television broadcasting. As previously mentioned, Ofcom recognises that further consultation is required before a decision is made on the need for radio broadcasters to obtain third party verification. Ofcom has therefore decided to vary the licences of television broadcasters only at this time. We intend to consult on radio later in 2008.

## Section 6

# New Guidance to broadcasters

## The Inquiry's recommendations

- 6.1 In addition to the key recommendations of licence variation and the need to introduce third-party audit, the Inquiry made seven further recommendations about broadcasters' management of viewers' participation in programmes, to be treated as guidance to licensees to clarify their responsibilities under either the Broadcasting Code or the amended licence<sup>15</sup>.
- 6.2 The Consultation referred to these other recommendations, explaining that they would be subject to an internal policy examination. Ofcom has now completed this process and has drafted new guidance as appropriate. This section therefore contains the new guidance, set within the existing Guidance Notes on the Broadcasting Code. The amended Guidance Notes will be made available on Ofcom's website<sup>16</sup>.
- 6.3 The first five of the Inquiry's recommendations for guidance were that licensees should be able to demonstrate that:
- the time for closure of the entries to a competition has taken due account in each case of the technical capacity, the likely level of response, and the time needed for winners or successful entrants to be selected fairly;
  - any process of shortlisting or selecting winners or successful entrants should begin only after the time set for closure of entries and after an additional time calculated to enable all entries to be aggregated;
  - in the event of a significant failure in the process becoming known before the result is broadcast, the result has been withheld until the failure is rectified;
  - programmes using SMS methods of entry have made use of MT (return path) charging<sup>17</sup> to minimise any risk that messages are charged but not received;
  - programmes using the "red button" entry route have ensured that entrants who press the button receive a specific visual on-screen warning explaining how to minimise any risk of their entry being charged but not received.
- 6.4 The sixth recommendation was specific to methodologies in competitions:
- except where the logic behind an answer is readily recognisable to a reasonable viewer, the methodology used to produce it should be adequately explained during the broadcast at the time the answer is given and that the broadcast of

<sup>15</sup> *Report of an inquiry into television broadcasters' use of premium rate telephone services in programmes*, published on 18 July 2007, available at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/>

<sup>16</sup> Available at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

<sup>17</sup> MT is short for 'Mobile Terminated' and is a term used in premium billing indicating that a message is paid for by the consumer when it is terminated on the consumer's handset, i.e. that a premium charge is incurred by a consumer when they receive a *return* message to their original SMS or MMS message. MO (Mobile Originated) billing applies the charge when the initial message is sent by the consumer.

both the answer and any explanation of how it was arrived at – should apply in the event that no entrant is successful at guessing it correctly.

- 6.5 The seventh recommendation related more generally to pricing, particularly the costs of calling with non-BT networks:
- “My view is that the present indications are inadequate and that a price range should be given, as a minimum measure. Such a statement might read “BT calls cost X. Other networks may cost more. Calls from mobiles will cost between Y and Z.”<sup>18</sup>”
- 6.6 The substance of this recommendation has been taken forward, with a particular emphasis on the likely higher cost of calling premium rate lines from mobile phones. However, concerns about the clarity and transparency of telephone charges are not limited to information provided on air by broadcasters, and Ofcom is also carrying out broader work in this area, notably in the *Ofcom review of regulation for premium rate services*.
- 6.7 We have decided not to issue guidance which specifically recommends the use of MT charging. Rather, this aspect of the Inquiry’s recommendations is incorporated into wider guidance on licensees’ responsibilities for the assessment and selection of networks.
- 6.8 Having considered all the recommendations carefully, we have now drafted new guidance on both the existing provisions of the Broadcasting Code and on the new licence condition. This is now set out below in the context of Ofcom’s existing Guidance Notes for Section 2 (Harm and Offence) of the Broadcasting Code, to which it will be added. A cross-reference to the new guidance is also included in guidance to Section 10 (Commercial References and Other Matters).
- 6.9 The revised guidance will come into force on notification to licensees of the outcome of the representations on the licence variation.

## Revised notes of guidance

**NB:** For ease of reference, deletions to the existing Guidance Notes are underlined. Additions are shaded grey.

### Rule 2.1

We recognise that some programming may include material that has the potential to be harmful or offensive. This puts a responsibility on the broadcaster to take steps to provide adequate protection for the audience. The criteria outlined in the meaning of “context” give an indication of what this may involve. Ofcom regularly publishes Broadcast Bulletins about programmes that members of the public have found harmful or offensive and Ofcom’s decision in those cases.

### Generally accepted standards

Broadcasters and the public view and listen to material measured against a background of generally accepted. Ofcom licenses an increasing number of satellite and cable channels, who broadcast solely to non-UK countries where different standards may apply. The

<sup>18</sup> Richard Ayre, in his *Report of an inquiry into television broadcasters’ use of premium rate telephone services in programmes*, published on 18 July 2007

understanding of what is “generally accepted standards” should be underpinned by relevant research.

Generally accepted standards will change over time and will also vary according to the context (as set out under Rule 2.3 of the Broadcasting Code).

Generally accepted standards also apply where programmes invite viewers or listeners to participate in them. Broadcasters should ensure that they take all due care to avoid disadvantaging any viewer or listener who votes, enters a competition, takes part in a poll or otherwise interacts with a programme by participating in some way. Further guidance is provided with reference to Rules 2.2 and 2.11.

For further guidance on “generally accepted standards” please see the rest of this guidance.

## Rule 2.2

Although it is a fundamental requirement of broadcasting that an audience should not be misled in the portrayal of factual matters, Ofcom regulates the accuracy of programmes *per se* only in News programmes.

Nevertheless, Ofcom is required to guard against harmful or offensive material, and it is possible that actual or potential harm and / or offence may be the result of misleading material in relation to the representation of factual issues. This rule is therefore designed to deal with content which **materially misleads the audience so as to cause harm or offence**.

It is not designed to deal with issues of inaccuracy or misleading material in non-news programmes and complaints that relate solely to inaccuracy rather than with harm or offence will not be entertained.

Whether a programme or item is “*materially*” misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and above all what the potential effect could be or actual harm or offence that has occurred.

This rule does not apply to News. News is regulated under **Section Five**.

In complying with Rule 2.2, broadcasters should pay particular attention to programming that encourages interaction from the audience as a contribution to editorial. Where a broadcaster’s compliance system for participation by the audience is inadequate or fails, this may give rise to a breach of Rule 2.2 if the audience has been misled about the standards it can reasonably expect for treatment of its communication with broadcasters. Premium rate telephone services (PRS) are typical means by which broadcasters encourage participation.

In these cases, harm or offence or both may arise in one of two ways. Firstly, the audience’s trust may have been abused, whether or not the interactive mechanism is free or charged for. Where the audience feels it has been misled or otherwise treated unfairly or negligently, this may cause serious offence; and where trust in broadcasting is undermined Ofcom is

likely to conclude that harm has been caused. Secondly, where a viewer or listener has paid a premium to interact with a programme, there is a clear potential for financial harm.

Ofcom has added a new condition to television broadcasting licences<sup>19</sup> to ensure that licensees are responsible for the management of all forms of communication they use for interaction with their audiences. The licence condition also requires verification by an independent third-party in respect of PRS voting and competition entries<sup>20</sup>.

The amended licences require the licensee to ensure ‘fair and consistent treatment’ of audience votes in television programmes. If compliance failures in the conduct of PRS voting are established Ofcom is likely to consider that Rule 2.2 has been breached.

Voting schemes and competitions share certain characteristics, such as the imperative to aggregate interactions efficiently, the need to build in sufficient time for viewers to interact and for processing votes and entries, and the importance of contingency procedures in the event of technical or other problems. The guidance given about competition design and conduct against Rule 2.11 addresses these and should be read by licensees who run or might run voting schemes.

Ofcom is the lead regulator for the TV broadcast use of PRS. Viewers who wish to complain about any aspect of participation, typically the use of PRS by broadcasters, are encouraged to contact Ofcom directly. However, when PRS is used the broadcaster usually contracts with a specialist service provider who is required to be regulated by PhonepayPlus (PP+). Ofcom and PP+ will where necessary co-ordinate investigations closely and if appropriate run joint investigations.

## Rule 2.11 Competitions

**Note:** Under a licence variation television licensees are required to ensure ‘fair and consistent treatment’ of audience votes. Broadcasting Code Rules 2.1 and 2.2 are also relevant. The guidance given below is appropriate to many instances of voting procedures. See also the guidance issued in respect of Rule 2.2.

This section also incorporates some broader guidance on the use of participation techniques – notably premium rate telephone services (PRS) – within programmes. Guidance on that subject is placed here for two reasons: much participation concerns competitions; and, more generally, Section 2 of the Code covers the subjects of harm (which can include financial harm) and misleadingness, both of which are core concerns in the operation of participative interactivity.

Some of the guidance below is provided in respect of conditions included in broadcasters’ licences, rather than the Broadcasting Code. Where this is so, the guidance includes an appropriate cross-reference to the licence conditions.

At the time of publication of this guidance television broadcasters’ licences have been varied to include new provisions, but radio licences have not. However, Ofcom will be consulting

<sup>19</sup> A further consultation will determine whether radio licences should also be amended.

<sup>20</sup> See Guidance Note on Verification systems for programme use of premium rate services

about corresponding changes to radio broadcasting licences. If radio licences do change this guidance will be updated.

### **Premium rate telephone services in programmes**

Following a large number of widely reported and serious compliance failures concerned with viewer participation, for the most part PRS applications, Ofcom commissioned an inquiry in March 2007. The inquiry concluded that systemic problems were evident in television broadcasters' use of PRS and recommended that broadcasting licences be amended so that responsibility for PRS use (and the use of other forms of communication with viewers) is retained by licensees whatever arrangements might be made with other parties. Following subsequent consultation, these licence amendments came into effect in spring 2008.

The report of the inquiry can be found at <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf>.

Because Ofcom's policy is therefore to reserve to TV broadcasters responsibility for 'means of communication' with the public, complaints to Ofcom about the use in programmes of telephone lines, SMS messaging, internet communication and so on will normally be dealt with at least by Ofcom. However, because the use of premium rate services will usually involve a specialist service provider regulated under the code operated by PhonepayPlus (PP+), Ofcom and PP+ will co-ordinate investigations closely.

PhonepayPlus (PP+) is introducing a prior permission scheme for PRS service providers who provide services to broadcasters. (Some services, such as live chat services, have for a long time required prior permission because of the nature of the service provided, rather than its provision in broadcasting. Those arrangements will continue.)

Other uses of PRS in broadcasting are now subject to a new scheme under which a service provider must demonstrate that it has sufficient technical capacity, expertise and contractual clarity to be able to provide PRS services to broadcasters. If it deems it appropriate – generally because bad practice is established – PP+ can withdraw permission from a service provider, barring it from broadcast PRS work.

Therefore, television broadcasters should be aware that any service provider they contract with for broadcast PRS services must hold the necessary prior permission status.

PRS is the most usual source of problems in this area and requires particular scrutiny. The licence therefore requires verification by an independent third party in respect of PRS voting and competitions where these are publicised in programmes.

Licensees' attention is drawn to PhonepayPlus's *A Statement of Expectations on Call TV Quiz Services*, which can be found at [http://www.phonepayplus.org.uk/pdfs\\_consult/Calltvquiz\\_SoE.pdf](http://www.phonepayplus.org.uk/pdfs_consult/Calltvquiz_SoE.pdf). This should, where relevant, be considered alongside the PhonepayPlus Code of Practice.

### **Competitions that use Premium Rate Entry**

- Complaints to Ofcom alleging the broadcast of misleading information about premium rate charges and/or line availability will normally be referred to ICSTIS, since they are considered to be complaints about promotional material concerning the premium rate service (PRS) itself. ICSTIS has issued A Statement of Expectations on Call TV Quiz Services, which can be found at

[http://www.icstis.org.uk/pdfs\\_consult/Calltvquiz\\_SoE.pdf](http://www.icstis.org.uk/pdfs_consult/Calltvquiz_SoE.pdf) and, where relevant, should be considered alongside its Code of Practice.

- Complaints concerning potential unfairness surrounding the conduct of a competition, or its solution and/or methodology, will normally be investigated by Ofcom.

### **The general conduct and design of competitions**

Ofcom expects all competitions to be run fairly and honestly. Broadcasters who run them are inviting viewers and listeners to take part in schemes on terms that would be assumed to be equitable and free of deception: everyone who takes part should have the same chances of winning and all aspects of a competition should be clear and fair.

### **Technical issues and production pressures**

Two features have been found particularly likely to produce difficulties with the proper running of competitions: the technical complexity of telephony and other communication technology chains, and the pressures of production, particularly live production. Each can give rise to problems by itself, but frequently the two effects interrelate.

### **Technical issues**

Broadcasters are strongly advised to seek expert guidance on all parts of the systems used by viewers for entry to competitions and relied on by broadcasters for the administration of competitions. This will include, as appropriate, expertise in such matters as telecommunications network capacity, 'latency' in mobile networks, reliability of equipment, service provider and aggregator capability, and the efficiency and robustness of communication between producers, service providers and others. **Where PRS is used for voting or competition schemes, a licence requirement of third-party verification and review applies – see separate guidance document [link]**

Broadcasters may not always have direct operational control of elements within the supply chain, for example telephone networks. But broadcasters do have control over the choice of particular means of communication and of contractors and intermediaries, and over contracts and other agreed protocols. Bearing in mind that responsibility in this area cannot be reassigned by broadcasters, licensees are advised to be able to demonstrate that all due care has been taken with network selection and operational arrangements. In the case of mobile networks this should include decisions about the choice of billing method.

Ofcom understands that PRS provision now generally allows lines to be closed at the end of voting and competition entry periods such that calls made outside those periods do not incur a premium charge. Arrangements in which calls continue to be so charged outside allotted entry or voting periods are very much more likely to be found in breach of the Code or of licence conditions. Licensees should make every effort to ensure that PRS charges are not applied in such circumstances. Because network charges may be incurred, broadcasters may wish to make clear to audiences that early or late calling will attract some charge.

In general, the robustness of systems should be assured whether interaction is charged for or is free. Broadcasters should, however, bear in mind that where revenue is generated from interactivity this will be regarded as an aggravating factor for penalties in cases of proven compliance failure.

'Red button' activities on certain platforms can be subject to user interaction such that entries and votes can be charged without the relevant interaction having been fully registered. This happens if users interact (i.e. press the red button or equivalent) in a way



that requires an online connection but then 'navigate' away from that connection prematurely.

- Broadcasters using 'red button' routes for interactivity should ensure that where a risk of user navigation 'error' exists such that charges might be incurred without the relevant interaction having been completed, viewers who select the relevant chargeable option receive a specific visual on-screen warning explaining how to minimise any risk of their entry being charged but not received.

### **Production pressures**

It is evident that some competitions have been operated improperly because production and editorial values have been placed before obligations of fairness: some broadcasters have regarded the maxim 'the show must go on' as trumping their regulatory (and ethical) duties.

One key consideration in the production planning for competitions is time. In live programming this concern is especially acute. Broadcasters will wish to consider carefully whether shorter live programmes are capable at all of providing sufficient time for the proper administration of competitions, mindful that some extra time may be necessary because of technical or other problems. Similar considerations apply to voting schemes.

Strains on the production process include competitions attracting no correct answers, technical problems leading to a breakdown in the process of gathering entries, choosing winners and communicating the necessary details, and difficulties with putting winners to air.

Licensees should, therefore, consider carefully whether the time for entry and for processing is safe and, importantly, be prepared to abort a competition and if necessary make clear to the audience that has been done.

- The time for closure of the entries to a competition should take due account in each case of the technical capacity, the likely level of response, and the time needed for winners or successful entrants to be selected fairly.
- In the event of a significant failure in the process becoming known before a result is broadcast, the result should be withheld until the failure is rectified and the audience so notified if appropriate.

There are further areas of advice indirectly related to production that broadcasters are reminded are also very important. For example, the handling of competition entries may be unfair if statistical flaws are introduced, for instance by selecting from proportions of entries from different routes (telephone, internet, post etc), or the exclusion of some entries by 'sampling' during an entry period. These techniques can easily bring about unfairness unless very close attention – likely to include expert statistical advice – is paid to the way that they are used.

Further, it is Ofcom's view that competitions resolved through the random picking of a winner are generally understood by viewers to operate as simple draws analogous to raffles and similar 'winner out of a hat' schemes: in other words, that all entries from which a winner will be chosen are entered into the pool. The selection should of course be genuinely random.

Where competitions are resolved in a different manner, for example by the first caller chosen or the automated elimination and selection of callers at the point of contact, it may be appropriate to adopt a different approach, but it is imperative that any selection method is fair and that great care is taken to ensure that viewers are made aware of the method of choosing winners or candidate winners.

- Without justifiable reason to do otherwise, any process of shortlisting or selecting winners or successful entrants should begin only after the time set for closure of entries and after an additional time calculated to enable all entries to be aggregated;

In all cases Ofcom's advice is that licensees should explain to viewers and listeners how a competition is run and the methods used for selecting winners.

### Pricing

This subject is of great importance. Licensees are advised to consider carefully the information they make available to viewers about costs and to give as much clear detail as is practicable.

Ofcom does not believe that conventional cost messages in programmes place sufficient stress on the higher charges likely to be incurred by some users of non-BT networks, particularly the mobile networks. Rather than merely saying that 'networks/mobiles may vary', Ofcom advises strongly that a more emphatic message is used, for example:

"Calls cost Xp from BT lines. Calls from other networks and from mobiles may vary and can cost a lot more. Contact your provider for details."

An alternative approach likely to be acceptable would be the use of a maximum mobile charge – an 'up to' price – where that can be established. Whatever form of words is chosen it should indicate that calls from mobiles may be significantly more expensive than the benchmark BT price.

### Free Entry Route

- In the future, legislation will require that free entry routes (where required) should be given equal prominence with other routes. We would encourage broadcasters to adopt this as best practice now, in advance of all the provisions of the Gambling Act 2005 coming into force. Broadcasters should be aware of the Gambling Commission's requirements concerning free entry routes, when published.

- The Gambling Act 2005 contains new provisions for lotteries. These include the terms on which free entry routes can be offered and promoted as a means to avoid prize competitions becoming illegal lotteries. Licensees are urged to seek expert legal advice on the law in this area. The Gambling Commission has published guidance, available at <http://www.gamblingcommission.gov.uk/Client/detail.asp?ContentId=194>.

### Prizes

- Prizes should be despatched within a reasonable time (note: where relevant, ICSTIS' PhonepayPlus's requirements may apply), unless indicated otherwise when the prize is described.
- If particular prizes become unavailable post-broadcast, we would expect comparable substitutes to be provided.
- We would strongly advise broadcasters not to present a monetary prize as a possible resolution of financial difficulty (e.g. as a means of paying off credit card debt). See also Rule 2.1.

### Competition Rules

- To ensure clarity, we expect rules that limit those who can take part in a competition to be broadcast. (Note: their broadcast is not expected if specific individuals – e.g. previous prize winners – have been informed directly). In particular, where such rules are considered to be significant (e.g. an age limit for entering a competition) broadcasters should air them orally each time a competition is run and on a regular basis throughout longer sequences.
- We strongly recommend that broadcasters produce written rules and/or terms and conditions that support all or specific competitions being broadcast by them. Where the competition is broadcast on television, details of where the relevant rules are available (e.g. on the channel/programme's website) ought to be aired regularly, while on radio, where competition strands are often shorter, we would normally expect such details to be mentioned at least occasionally. Broadcasters may also need to be aware of ICSTIS' PhonepayPlus's requirements regarding this issue, including those in its Statement of Expectations.
- Competitions are sometimes run simultaneously on various local/regional services (e.g. on a radio network), and this may result in participation being spread wider (i.e. beyond the local area) than might be obvious to the viewer/listener in any one area. In such circumstances, and where the main prize is not awarded by each service, we would normally expect that, in order to be fair, it has to be made clear that other services are participating. This should be done both on air and in any written rules, whenever the competition or its results are run or trailed.

## Solutions and Methodology

A cause of complaint has been that, at the end of a competition, the way in which the solution is reached ('methodology') has not been explained on air and, in some cases, the answer has not been given. As many competitions are cryptic, this leads some of the audience to doubt whether the solution given is correct and to question the legitimacy of the competition. This is often because the complainant cannot understand the methodology. A further concern expressed by complainants is that as many competitions have more than one possible solution, the broadcaster may change the answer while a competition is on air, preventing it being solved too early. Sufficient transparency is therefore necessary in order to ensure that competitions are both conducted fairly and seen to be conducted fairly, to avoid unnecessary audience concern.

- We recognise that the methodology of a competition may be commercially sensitive. Broadcasters may choose to outline it on air, but this is not a requirement to achieve fairness in competitions.
- Except where the logic behind an answer to a competition question is readily recognisable to a reasonable viewer, the methodology used to produce it should be adequately explained during the broadcast at the time the answer is given. The same guidance – the broadcast of both the answer and any explanation of how it was arrived at – applies in the event that no entrant is successful.

It is expected by Ofcom that explanations of methodologies will normally be given during a programme. But there may be occasions where it is appropriate for licensees to provide that explanation in additional ways, such as on a website. When this is done, clear directions to viewers about how to access the methodology should be given. With complicated methodologies, it is likely that a web page or other medium that can allow viewers time to study the explanation or make a copy of it will be particularly appropriate, although licensees should always expect to give the methodology on air as well.

None of the guidance given above about disclosing methodologies should be understood as justifying any methodology that is unfair. Ofcom regards obscure or absurd methodologies, of any sort, as unfair. The Broadcasting Code is most likely to be breached in this respect where arbitrary or contrived puzzles are presented in a way that suggests they can be solved by straightforward means. Further discussion about this is given below.

- Where a competition is cryptic or ambiguous, or there appears to the audience to be more than one possible answer to a competition, broadcasters must, when requested by Ofcom, provide evidence that the competition has been run fairly. Broadcasters should be able to provide Ofcom with the correct answer and the methodology used to arrive at that answer, together with evidence that it could not have been changed after the competition started. For example, a broadcaster may choose, before a competition is run, to place its chosen methodology and/or answer with an independent professional third party (e.g. an auditor or solicitor).
- We recognise that competitions may be carried forward to another time/day. Appropriate transparency about this is important. However, where competitions form the essential feature of a programme (e.g. in the case of Call TV quiz services or similar) an audience should normally be able to expect be given the correct solution to be provided on air, with or without and its associated methodology, when a competition ends.
- For a competition to be conducted fairly, we believe its correct solution should be reasonable (i.e. not unfairly obscure) and certain. This applies to all competitions, including those that Ofcom judges to be dependent to any extent on factual recall and/or the application of established protocol (e.g. accepted mathematical process). However difficult or cryptic the competition itself, we would expect application of the methodology to produce only the correct solution. All methodologies should be clear, comprehensive and precise.
- If a methodology is re-used in any later but similar competition by a broadcaster, the instructions or questions given to viewers and listeners in the subsequent quizzes should not differ materially from those given to the audience when the methodology was used previously. It is expected that the audience shall not be led to believe that a different methodology applies in the later competitions. For example if a methodology is re-used, any instruction or question given to the audience in the first broadcast of the competition (e.g. “add all the numbers”) and the name of the competition should remain the same, and not be changed (e.g. “add all the numbers” to “solve the sum”). Equally, if the name of a quiz, and the instructions or questions issued to the audience, are repeated in a subsequent competition, and if the information the audience has to consider is in a similar format, the methodology should be the same.
- In order to conduct a competition fairly, an audience should not be misled by a broadcaster stating or implying that a competition is simple if it is actually difficult or cryptic.

### Repeat Broadcasts

- If a former live competition is re-run so that it is no longer possible for the audience to participate by ringing the number given on air then we would expect this to be made clear to the audience. On television, text stating “pre-recorded” is likely to be insufficient unless the phone line is also dead or the number on screen is also

illegible. Broadcasters may also need to be aware of ICSTIS' PhonepayPlus's Code of Practice concerning this matter.

### **Winners**

- As best practice and to forestall audience concern, broadcasters may wish to consider listing the names of all winners, with their permission, on an appropriate website as soon as possible after their wins.

## Annex 1

# Draft 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(a) 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.

(b) Where the Licensee uses a Controlled Premium Rate Service as defined under the PRS Condition in force at the time made under section 120 of the Communications Act 2003 as the method of communication for voting or competitions, the Licensee shall ensure that its compliance procedures include a system of verification by an appropriate independent third party ('the third party'), in accordance with the following requirements:

- (i) Verification shall include confirmation by the third party that an end-to-end analysis of the technical and administrative systems to be used for the receipt and processing of votes and competition entries from members of the public has been conducted and that such systems fulfil all the requirements set out in paragraph 2 above. All such systems and the analysis of such systems must be fully documented.
- (ii) Verification shall include appropriately regular reviews by the third party of individual programmes. Such reviews must track all votes or competition entries through all stages from receipt, and the results of each review must be fully documented.

(iii) The Licensee shall ensure that a Director of the Board (or, where there is no Board, an appropriate equivalent) ('the designated Director) has specific responsibility for verification.

(iv) The Licensee shall ensure that the third party provides reports regarding analyses of processes (as specified under sub-paragraph 3(b)(i)) and reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)) to the designated Director. If significant irregularities or other problems are discovered, the Licensee shall ensure that these are reported forthwith to Ofcom.

(v) The Licensee shall provide forthwith and in an appropriate form any information requested by Ofcom regarding verification.

(vi) The Licensee shall retain for at least two years all relevant data regarding votes and competition entries from callers by means of Controlled Premium Rate Services and retain all documentation regarding the verification of its systems (as specified under sub-paragraph 3(b)(i)) and the reviews of individual programmes (as specified under sub-paragraph 3(b)(ii)).

(vii) The Licensee shall publish annually a statement signed by the designated Director confirming that he is satisfied that the Licensee has in place suitable procedures to fulfil the requirements of paragraph 3(b) and confirming the name of the third party engaged by the Licensee to fulfil the requirements of paragraph 3(b).