

ITV Plc response to Ofcom consultation on Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial

Introduction

ITV Plc (referred to hereafter as ITV) welcomes this consultation following the Ayre report and recognises much needs to be done to restore public confidence following the various incidents that have come to light across the industry. These incidents have raised very serious concerns about the relationship between broadcasters and consumers, and the relationship between broadcasters and third party telephony suppliers. These incidents have seriously undermined the privileged relationship of trust that broadcasters have with viewers.

In March ITV Plc suspended all its premium rate participation and interactive services, pending independent third party review by Deloitte. The review consisted of three main parts:

- a) Phase 1 – Deloitte reviewed procedures in relation to specific programmes being or about to be broadcast in order to strengthen procedures (with interactive elements of programming returning to screen only once cleared by Deloitte);
- b) Phase 2 – Deloitte helped to identify processes and controls that could be put in place to reduce the risk of failures arising in the future
- c) Phase 3 – Deloitte undertook an investigation to establish the nature and scale of any incidents relating to participation programme elements in ITV programmes over the previous two years (1 April 2005- 31 March 2007)

The findings of the review will be published shortly and subject to separate discussion with Ofcom.

Whilst the Ayre Inquiry may have found some evidence that public trust in broadcasters' ability to handle PRS interactions properly has been damaged, it is worth noting that consumer behaviour does not appear to suggest that this is the case across the board. Many of ITV's programmes are showing strong participation levels, suggesting a level of consumer confidence and demonstrating the popularity of such interactions within programmes. For example, participation in some competitions are well up year on year and Britain's Got Talent broadcast earlier this year received around 3 million votes. ITV believes that viewers want to continue to interact with programmes in the future, with the assurance they do so in a robust, fair and responsible environment.

ITV broadcasts a variety of forms of participation TV. Viewer participation and interaction in programmes has grown as consumer demand has increased, technology has facilitated easier communication with programmes and formats have been developed with viewer participation in mind.

Today, ITV's participation TV ranges from the mainstream – such as voting to influence the outcome of entertainment programmes like Britain's Favourite View, to competitions in daytime magazine programmes or "reality" shows such as Hell's Kitchen. The participative elements are integral to the editorial and narrative structure of programmes and offer great enjoyment to viewers.

Since 2005 ITV has also broadcast dedicated quiz TV programmes, or "Call TV", under the programme brand of ITV Play. This has included programming on ITV1 and overnight by ITV Plc on its digital channels ITV2, ITV3 and on a standalone channel ITV Play. ITV Plc has sought to act fairly in all its dedicated TV programming, setting high standards in this relatively new genre. However, as announced last month dedicated call TV will cease broadcasting on ITV Plc's channels at the end of 2007, a decision made on commercial grounds.

ITV recognises the need for broadcasters to understand the position of the viewer as consumer, and the need to ensure that all programme making and PRS systems are operated to ensure that consumers are treated fairly.

However, ITV believes that there is a need to recognise that further regulatory changes are not the principal priority in re-building trust. Rather, it is the extent to which broadcasters have reviewed and amended processes and protocols to 'put their own houses in order' through their own initiatives to ensure compliance with the existing regulatory regimes. This is exactly what ITV has sought to do. ITV is also keen to work with other broadcasters to ensure that the industry can restore trust through other possible voluntary initiatives, such as joint training programmes.

ITV believes that all regulation needs to be proportionate. It should work in the best interest of viewers and consumers, enabling them to enjoy taking part in programmes, but allowing broadcasters the freedom to make programme commissioning and production decisions that serve the needs of both audience and broadcaster.

It is worth noting that the regrettable incidents that have occurred have not resulted from any failure or lack of regulation but the failure of broadcasters, producers and service providers to ensure that regulation is adhered to and best practice followed. Those incidents have been effectively investigated and sanctions imposed within the existing regulatory framework – and have led in some cases to very serious financial penalties and public reprimand. The most important step will be to ensure that the industry does not make similar mistakes again that require such regulatory intervention.

Protection of viewers and consumers in all PTV

1. Do you agree that television broadcasters should be directly responsible for PRS in its programmes and also for other forms of communication where viewers seek to interact with programmes? Please explain why.

ITV takes its responsibility to ensure that all its activities operate fairly extremely seriously. That responsibility is particularly important where consumers are being charged to participate and where a direct financial transaction is involved.

ITV accepts the views of Richard Ayre and Ofcom that it is appropriate and practical for broadcasters to shoulder primary responsibility. Broadcasters are the public face of the value chain of the various parties involved in delivering a programme featuring participation. Viewers are most likely to associate programme competitions, voting or other interactive elements with the broadcaster and assume that broadcaster's responsibility for those elements.

It is clear that broadcasters, including ITV, have underestimated the need to ensure the integrity of all parts of the value chain. However, ITV questions whether broadcasters can and should be *solely* responsible for *all* elements of participation in TV. Throughout our own review of PRS and participation ITV has been keen to ensure that all elements of the value chain act properly and fairly. Where possible the broadcaster should have primary responsibility to ensure that these third parties have sufficiently robust systems in place and that contractual arrangements seek to ensure that consumers are protected.

However, it is important to recognise that failure may occur in circumstances outside the broadcaster's control. Broadcasters should be judged in relation to the adequacy or diligence of their *oversight* of all the processes that go to enable interaction, rather than be subject to a strict liability for any failure anywhere in the chain.

ITV accepts all the systems used in relation to PRS and participation TV should ensure that all viewers stand a fair and equal chance of winning or that their vote will be counted. As far as possible, ITV will always seek to reflect this objective in its contractual arrangements and operating relationships with third parties.

Ofcom will recognise that no broadcaster can achieve an operating procedure or system (however robust) that can eliminate all failures or human errors in the value chain. This point was recognised by Richard Ayre when he said: "I recognise, and audiences would accept, that in any technology handling millions of calls a few will go astray". For example, technological failures might occur as a result of network problems which could not have been prevented by either strict service agreements or system design and oversight. Such accidental and unforeseen issues should not be the sole responsibility of the broadcaster. As long as there is a regulatory system in place to deal with the separate and specific regulation of service providers (i.e. Phone Pay Plus) then those service providers should continue to be answerable to Phone Pay Plus under its codes. Recent cases have been investigated by both Phone Pay Plus and Ofcom with each regulatory body imposing sanctions on relevant operators within the value chain under separate and specific regulatory codes.

Ofcom's consultation suggests that broadcasters would be able to protect themselves contractually from such problems occurring as a result of the actions of third parties, and that broadcaster always have complete control over the arrangements reached with third party contractors. This is not always the case.

Contractually defined obligations are clearly important to demonstrate that due care has been taken by the broadcaster to ensure protection of the viewer at every level of the value chain. However, as a matter of public policy, broadcasters cannot be fully indemnified for any subsequent criminal liability of regulatory sanction. Whilst accepting overall responsibility in putting necessary systems in place, in the event that a third party contractor breaches contractual arrangements, the broadcaster's liability should be judged by the regulator in the light of the adequacy of its due diligence, and its actions once failures have become apparent to the broadcaster, not simply the resulting harm or other consequences in relation to an error or deliberate breach over which it had – and could not have had – control. ITV would make the following observations:

In relation to production companies, indemnities contained in terms of trade agreements would not allow the broadcasters to recover fines from production companies. Furthermore, under the terms of trade, production companies have the right to appoint service providers and broadcasters have no right to object to their choice. In giving broadcasters overall responsibility for PRS, Ofcom might therefore consider allowing broadcasters via their terms of trade to overrule the appointment of a service provider and appoint its own preferred supplier. Under the Phone Pay Plus Code an information provider such as a broadcaster or producer can only be made liable for sanction in place of the service provider if they consent to take responsibility for the fault. ITV would also welcome the opportunity to discuss with Ofcom and other interested parties the scope for the introduction of a voluntary code of practice by the independent production community.

In relation to Phone Pay Plus' powers in relation to service providers, ITV agrees with Ofcom that there is scope for considerable potential confusion over the respective roles of Ofcom and Phone Pay Plus, both for consumers and broadcasters. Further clarity is needed in future about the exact role and responsibilities of and the regulatory relationship between the two bodies. In particular, clarity would be welcomed in relation to the imposition of sanctions where there is an apparent risk of 'double jeopardy' for any programme being sanctioned. If a broadcaster is to take responsibility for the use of PRS within programmes and overall responsibility for each part of the value chain, it must be made clear that the broadcaster should not face a 'double sanction' in relation to service provision and the editorial content of the programme.

2. 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?

Through its broadcast licences, ITV is subject to the provisions in the Ofcom Broadcasting Code relating to harm and offence and fairness. In those instances where complaints relating to PTV have been upheld, it is because they have been shown to have contravened existing regulation under the current Code. These cases have shown clearly that the Code provides powers to impose very substantial sanctions where appropriate. It is therefore not inadequate regulation or omissions in the licences that have caused the problems, but rather the failure of broadcasters to adhere to the regulations.

ITV does not believe that licence variation is necessary or the most appropriate way of achieving greater consumer protection. Instead, ITV strongly advocates that the detail outlined in Annex 5 would be better contained in a revision to the Guidance to Section 2.11 of the Broadcasting Code.

Other areas of detail in broadcasting regulation are not included in licences in this way, and it is hard to see why this issue should constitute an exception. Any further amendment at a later date to guidance on PRS and participation services, as those services evolve, would require yet further complex amendment to the licences, whereas Guidance can readily be revised. ITV believes this would be a simpler – but equally effective – solution.

3. 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.

No. As ITV has argued above, the voluntary steps taken by industry to improve the operation of participation services will be the most effective way of addressing the problems that have arisen to date, and restoring viewer trust. Ofcom has wide ranging powers of investigation already and can call for information in the event there is a suspected breach of the Code. We note that third party verification is not a requirement in respect of other areas of broadcasters' Code responsibilities. We see no pressing need for the intervention of third parties in ensuring our observance of Code principles and our responsibilities to the consumer. In addition, there are likely to be very few third parties with the necessary expertise to add genuine risk reduction without close guidance from internal teams within the broadcaster.

However, in the event that Ofcom deems it necessary that some form of independent verification should be imposed on broadcasters in this area, of the options canvassed, ITV favours Option B. We would suggest that the frequency of such reporting would need to be made clear and we would recommend strongly that it should be no more than an annual return. This would fit most effectively with existing review and auditing processes, and would mirror the pattern of Ofcom's annual review of programming. It would

also ensure the process would be manageable for broadcasters, ensuring that the data can be collated within predictable timeframes.

In relation to the other options set out by Ofcom ITV would make the following comments:

Option A appears to suggest that Ofcom would require third party verification of any interactive activity within any programme on request. This is wholly impractical and would require such resourcing as to make interactive elements non-viable. ITV would welcome further clarification from Ofcom about how Option A would work in practice, in particular on the frequency and detail of such ad hoc requests. It cannot be Ofcom's intention or objective to regulate interactivity out of existence by the imposition of unrealistic burdens of reporting.

ITV believes that Option C would also be disproportionately onerous, particularly when the steps that ITV will already be undertaking to improve internal procedures are taken into account. ITV believes that this option would entail significant additional financial and administrative burdens whilst not adding any obvious benefit to the verification provided for under Option B.

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.

ITV believes that any of the material in this draft, if deemed necessary would be better reflected in amendment to or expansion of the Guidance to the Broadcasting Code rather than in individual licences. ITV would be happy to discuss further with Ofcom details of this revision. We take no exception to much of the drafting of the Annex but would note that broadcasters are already obliged to carry out the requirements of section 2 of that draft.

Do you agree that the draft licence obligations should not be limited to television but should also apply to radio broadcasters? Please provide reasons.

ITV sees no reason in principle why such regulation should be confined to television. Radio is equally susceptible to the issues that have arisen in relation to participation in television programmes.

Separation of editorial and advertising in dedicated PTV

ITV Plc launched dedicated quiz TV programming on its channels in 2005. Under the ITV Play banner, a range of dedicated call TV quiz programmes aired on ITV1, ITV2 and ITV3 overnight and for a time on the stand alone channel ITV Play. In September ITV Plc announced that it would be closing its dedicated quiz TV programming due to commercial considerations.

When ITV Plc entered the dedicated quiz TV sector, it was a priority from the outset to set the highest standards in a sector that had been developing on

cable and satellite channels for a few years. ITV sought to put in place the most stringent consumer protection measures in the sector. This included clear and regular information about the price of taking part, a viable free entry route, in-call warnings and a dedicated customer care team. It is worth noting that ITV Play programming has generated relatively little complaint in the handling of calls and entries. Furthermore dedicated quiz TV, as opposed to other forms of dedicated PTV is already very tightly regulated, being subject to regulation by both Ofcom and Phone Pay Plus (formerly known as ICSTIS).

Despite plans to exit the call TV quiz market at the end of the year, ITV believes that flexibility should be allowed for this type of participation programming in future, in line with audience demand and evolving programming models. While ITV has no plans of this nature at present, ITV believes that there should be scope to continue to operate forms of dedicated PRS services in future in response to viewer interest, market conditions and as long as they operate fairly and transparently within the regulatory framework.

Which of the options proposed in Section 6 do you believe is the most appropriate to ensure separation of advertising from editorial content? Please explain why.

ITV is not convinced that any change is necessary, when the other detailed regulations around participation TV (including the proposed clarification for all participation TV above) are taken into account. If change is deemed to be required, ITV believes that Option 2 is the most appropriate. Of the options presented, this is most likely to ensure that advertising and editorial content are kept separate, whilst enabling consumers to enjoy participating through PRS services within programming.

ITV believes that this option provides a greater level of detail about the way in which PRS participation should operate whilst enabling editorially linked participation to continue. ITV agrees with Ofcom that this would bring greater clarity and certainty in a relatively simple way.

ITV also believes that requiring chat-based services to take all calls by presenters on air will help ensure that the PRS/participation is more integral to the editorial nature of the programme. However, it is important that these particular provisions relate narrowly to dedicated chat-based services only.

ITV does not believe that Option 3 would offer much of significance to consumers. Under existing regulations programming already carries significant amounts of information on screen. The addition of yet more information is likely to prove confusing rather than helpful to consumers. In addition reference to the programme or channel being funded by calls may not be accurate. Transparency about the cost to the consumer of taking part is in our view the information that is required and most useful in the decision to participate.

Option 4 would pose a very real threat to the future of dedicated PTV. ITV is aware that the European Court of Justice (ECJ) is due to rule on a case involving an Austrian quiz TV programme and that the court's decision may ultimately supersede Ofcom's decision on the future classification of PTV.

ITV recognises that Ofcom's powers to intervene in this case are limited, but insofar as any regulatory changes are required as a result of the Court's judgment it is to be hoped that this would be kept to a minimum and impact as little as possible on the legitimate and popular activities of UK broadcasters.

Do you have any comments on the draft new rules and guidance in respect of Options 2, 3 and 4 as set out in Annex 6? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

ITV has two comments to make on the drafting of Option 2:

1. Generating further contact with participants:

In a number of ITV's PRS activities, text entries receive a 'bounce back' message containing the receipt of entry and in some limited cases this might also include a marketing message, for example, "Thank you for your vote. X Factor is sponsored by the Carphone Warehouse" or "Thank you for your vote". To get more information about the show or to see more episodes you may have missed, go to [website address]. Messages confirming that a transaction has taken place are compulsory under the distance selling regulations. Marketing messages are permissible under the Privacy and Electronic Communications (EC Directive) Regulations 2003, subject to certain criteria being met. It is also worth noting that this generates little viewer complaint and is standard practice.

Viewers are informed before they enter any PRS activity that text messages will cost a standard network rate text message (i.e. the cost of entry states it will be, for example, £1 plus one standard reply rate message). The reply message is sometimes used as a payment mechanism for the vote or competition and therefore cannot be operated without a bounce-back message. In relation to marketing messages, viewers are also given the option to opt out of receiving these messages by inserting NOINFO at the beginning of their text entry/vote. This information is provided on screen and is included in ITV's terms and conditions, also signposted on screen.

ITV therefore recommends that this line should be deleted and replaced with:

When using a caller's number to generate further contact, whether by voice service, SMS, MMS or other means, providers of dedicated participation programmes and their third party providers should ensure that viewers are given the option to opt out of receiving further

marketing messages in their confirmation text message. Any further contact of this nature should be limited to one message per entry.

2. Method of payment

ITV does not believe as a matter of principle that Ofcom should limit the methods of payment in relation to programme participation. The development of new mechanics of payment and methods of interaction will undoubtedly arise in coming years and Ofcom should look to ensure Rules are designed to promote the broad principles of consumer protection and separation of advertising and programme elements, not to ban any particular technology of communication or payment method, given no such ban exists for programme related material generally.

If any interaction with a programme requires a payment, the criteria should simply be whether this enables the viewer to participate in or otherwise contribute to a programme or, in keeping with the current definition of programme related material, allows viewers to benefit fully from that programme. Therefore ITV proposes the deletion of the currently drafted Section 10.10 in Option 2 and the Guidance as to Method of participation and payment.

Do you agree that Option 2 clarifies the existing provisions of the Broadcasting Code and therefore should not be limited to dedicated PTV only, but should apply to all editorial content (on both television and radio) which invites viewers to pay to take part? Please give reasons.

ITV accepts the proposed draft revision of section 10.9 – 10.11 of the Code as set out in Option 2, save for our objection and proposed revisions set out above.

Has Ofcom correctly identified, in Section 6 and the Impact Assessment in Annex 7, the various impacts arising from each option for dedicated PTV? Again, please give reasons.

ITV runs hundreds of premium rate participation activities a year. Therefore, there is potential that independent third party verification would be very costly. However, it is difficult to comment precisely on the scale of that cost without knowing the level of detail into which broadcasters would be required to go for the information to be sufficient. While broadcasters would be given some flexibility to decide how to provide third party verification, there is a large cost variation between occasional spot checks and regular live monitoring. The sign off of a more formal 'audit' would be likely to entail very significant costs to reflect the risk assessment that the verification company would be taking on. In any event, this is likely in ITV's case to run into tens of millions of pounds. This would also be in addition to the substantial cost incurred to improve systems internally, which as ITV has argued above is likely to be most effective means of restoring consumer confidence.